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Supreme Court, U. S.
FILED
JUN 10 1972
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

No. A-1185

WENDEL EVERETT LOWRY and LOWRY INVESTMENTS, INC., a Colorado corporation,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

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INDEX

I. Opinion Below 1

II. Grounds for Jurisdiction 1

III. Questions Presented for Review 2

IV. Statutory Provisions 3

V. Statement of the Case 3

VI. Evidence Against Lowther and Courts 19

VII. Argument—

A. The trial court's denial of Lowry's repeated requests for a separate trial amounted to a denial of a fair trial 26

B. The trial court's instructions relating to the consideration of all of the acts, omissions, declarations and statements made by any and all of the participants in the alleged unlawful scheme to defraud deprived the Petitioners of a fair trial by Constitutional standards 34

C. The extensive and indiscriminate use of hearsay testimony in a criminal case involving an alleged scheme to defraud, and the incomplete and inexact nature of instructions relating thereto, have reached such Constitutional dimensions as to require the Court to intervene in the exercise of its rule-making powers 40

D. The Court of Appeals for the Tenth Circuit, in writing an opinion containing a number of material misstatements of fact, so far departed from the accepted and usual course of proceedings so as to warrant the invocation of the Court's powers of supervision 43

Conclusion 48

Appendix A—Opinion, United States Court of Appeals, Tenth Circuit A1
Appendix B—List of Exhibits A19
Appendix C—Errors in Names A23

Table of Authorities

CASES

Barton v. *United States*, 263 F.2d 894 (C.A. 5) 33
Blumenthal v. *United States*, 332 U.S. 539 35
Burgett v. *Texas*, 389 U.S. 109 31
Della Paoli v. *United States*, 352 U.S. 232 ..... 38, 39, 41
Dutton v. *Evans*, 400 U.S. 74 ..... 33, 34, 35, 39
Fischer v. *United States*, 212 F.2d 441 (C.A. 10) 39-40
Kotteakos v. *United States*, 328 U.S. 750 40
Krulewitch v. *United States*, 336 U.S. 440 ..... 30, 31, 39, 41
Madsen v. *United States*, 165 F.2d 507 (C.A. 10) 40
Nash v. *United States*, 54 F.2d 1006 (C.A. 2) 31
Schaffer v. *United States*, 362 U.S. 511 ..... 27, 32, 42
Sims v. *United States*, 405 F.2d 1381 (C.A. D.C.) 33
Troutman v. *United States*, 100 F.2d 628 (C.A. 10) 40
United States v. *Decker*, 51 F.Supp. 20 (D.C. Md.) 33
United States v. *Haupt*, 136 F.2d 661 (C.A. 7) 31, 32, 37, 38, 43
United States v. *Johnson*, 337 F.2d 180 (C.A. 4), *affirmed*, 383 U.S. 169 33
United States v. *Kelly*, 349 F.2d 720 (C.A. 2) 29, 35, 36, 37, 43
United States v. *Varelli*, 407 F.2d 735 (C.A. 7) 30

Rules and Statutes

C.R.S. 31-4-22 (1963) 45
Federal Rules of Criminal Procedure—
Rule 14 27
Rule 52(b) 39
Rule 29(b) 4
Rules 19 and 22 of the Supreme Court 2
Section 17(a), Securities Act of 1933, 15 U.S.C. Sec. 77q(a) 3
18 U.S.C.A. § 371 4
28 U.S.C. § 1254 2

Other Authorities

Annual Report of Attorney General for 1925, pp. 5-6 41
O'Darugherty, Prosecution and Defense under Conspiracy Indictments, 9 Brooklyn L. Rev. 263 41
Developments in the Law: Criminal Conspiracy, 72 Harvard L. Rev. 920, 980-983 41
Guilt by Association—Three Words in Search of a Meaning, 17 U. of Chi. L. Rev. 148 41
The Conspiracy Dilemma, Prosecution of Group Crime and Protection of Individual Defendants, 62 Harvard L. Rev. 276 41

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I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in 455 F.2d 657. A copy of the opinion is appended hereto as Appendix A.

II.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the judgment of conviction of the United States District Court for the District of Colorado sought to be reviewed herein, was entered on January 24, 1972. Petitioners' Petition for a Rehearing was denied on April 13, 1972. By order dated May 9, 1972, Petitioners were granted an extension of time to June 12, 1972, within which to petition for certiorari.

Jurisdiction is conferred upon the Court to review the judgment of the Court of Appeals for the Tenth Circuit by virtue of 28 U.S.C. Sec. 1254 and Rules 19 and 22 of the Rules of the Supreme Court.

III.

QUESTIONS PRESENTED FOR REVIEW

A. Was it error to deny Petitioners' repeated requests for a separate trial? (See Lowther vs. United States A-969.)

B. Did the trial court's instructions relating to the consideration of hearsay and out-of-court activities of the participants in the alleged scheme to defraud deprive Petioners of a fair trial by Constitutional standards?

C. Has the extensive and indiscriminate use of hearsay testimony in criminal cases involving conspiracies or schemes to defraud, and the incomplete nature of admonitions and instructions relating thereto, reached such Constitutional dimensions so as to require the Court to intervene in the exercise of its rule-making powers in this area of the federal law of evidence?

D. Did the Court of Appeals for the Tenth Circuit, in writing an opinion containing a number of material misstatements of fact, so far depart from the accepted and usual course of proceedings so as to warrant the invocation of the Court's powers of supervision?

IV.

STATUTORY PROVISIONS

The Petitioners were convicted on one count of a seven-count indictment of fraud in the sale of securities in violation of Section 17(a), Securities Act of 1933, 15 U.S.C. Sec. 77q(a) which provides as follows:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly, or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

V.

STATEMENT OF THE CASE

Petitioners Wendel Everett Lowry and Lowry Investments, Inc., along with Harry Allen Lowther, Jr. (Petitioner in A-968), and Carl Evert Courts, were indicted on six counts of using the mails in the employment of a scheme to defraud in the offer and sale of securities as proscribed by § 17(a)(1) of the Securities Act of 1933, 15 U.S.C.A. § 77q(a), and in a seventh count, they were

charged under the general conspiracy statute, 18 U.S.C.A. § 371. The seventh count was dismissed by the Government before trial. At the conclusion of the presentation of its evidence, *the Government moved for a dismissal of Count Four.*[1]

Motions for Judgment of Acquittal were filed at the conclusion of the Government's case by all Defendants, argued and denied. At the close of the evidence presented by the Defendants, the Motions for Judgment of Acquittal were renewed by all Defendants. The court reserved decision on the Motions as is permissible under Rule 29(b) of Fed. R. Crim. P., and submitted the case to the jury.

The jury returned a verdict of "not guilty" as to the Defendant Carl Evert Courts on all of the remaining five counts. A verdict of "guilty" was returned as to Harry Allen Lowther, Jr., and Petitioners, on Count One. Verdicts of "not guilty" were returned on Counts Three and Five as to Harry Allen Lowther, Jr., and Counts Two and Six as to Petitioners. The jury failed to reach verdicts on Counts Three and Five as to Defendants Wendel Everett Lowry and Lowry Investments, Inc., and Counts Two and Six as to Harry Allen Lowther, Jr., and were then discharged from further service.

Within the time provided by Rule 33 of Fed. R. Crim. P. Petitioners filed a Motion for a New Trial, which was

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1. Count two involved use of the mails by the appellants on or about December 8, 1965, to send Roy Dickson a letter bearing the name of the Elkton Company; Count three involved use of the mails on or about December 17, 1965, to send Emil Endres a stock certificate for 2,500 shares of Elkton stock; Count five involved use of the mails on or about December 7, 1965, to send Howard Kuhnle a confirmation of sale of 5,000 shares of Elkton; Count six involved use of the mails on or about March 15, 1966, to send a stock certificate for 50,000 shares of Elkton stock to Claudius Fingar. Count four involved use of the mails on or about December 8, 1965, to send Homer Rogers a confirmation of sales of 2,500 shares of Elkton stock and Count seven involved conspiracy to commit offenses against the United States.

denied. Defendant Wendel Everett Lowry was sentenced to a term of two years; Lowry Investments, Inc., was fined in the sum of one thousand dollars.

In the interest of brevity, Petitioners Wendel Everett Lowry and Lowry Investments, Inc., will hereafter be referred to as "Lowry"; Harry Allen Lowther, Jr., as "Lowther"; and Defendant Carl Evert Courts as "Courts".

Lowry was 37 years of age at the time of trial and had been a broker-dealer in Colorado Springs since 1954 (T. 2133). He was an investment counselor and held a Bachelor of Science degree in Business Administration from the University of Colorado. He had a minor in Marketing (T. 2134). He specialized in what are called "penny stocks" (T. 2135). He had a keen interest in gold mining stocks and other speculative natural resource issues, and was well versed and experienced in the field (T. 2137-2139). He had dealt in Elkton stock ever since he had been in the business (T. 2143; Def's Ex. L, J, K, M and N). In fact, he had a large inventory at the time of his so-called "tender offer" letter of November 13, 1965 (T. 2150). He was an officer of the Colorado Springs Stock Exchange which specialized in such penny stocks (T. 2170).

It was established that he had developed the practice of sending investment bulletins on an average of once a year to customers on his mailing list (T. 2163), and every month or so, he drafted and mailed a "market letter". These documents (Defs.' Ex. D and E; Govt.'s Ex. 92, 93, 94, 95, 96 and 97) will disclose that Lowry dealt in more than 70 of these highly speculative stocks. Excluded Defs.' Ex. Y1-232 (T. 2216) were offered to show that Lowry had been dealing with these stocks over the years, and had written many market letters of the same tenor and type as the exhibits which have been offered against him. The investment bulletins made it clear that the list of stocks con-

tained therein and analyzed by Lowry, were "speculative natural resource issues", where the information contained therein was obtained, and that such information was not guaranteed. It was further stated in each and every bulletin that the list was not complete, nor was the information on each company complete. Howard J. Kuhnle, Betty Jolkovsky, Emil Andres and Roy E. Dickson (complainants) were on the mailing list (T. 2168).

The market letters uniformly advised the investor that Lowry was acting as principal, and that the list of stocks were speculative natural resource issues. Much information is contained in these letters, some of it statements of what had been done, or was expected to be done by the various companies discussed, and opinions as to what may come about.

On April 7, 1965, the Elkton Company sent a "Special Report" to Elkton shareholders advising of pending foreclosure proceedings (Defs.' Exhibit S) (T. 2182). Lowry and other stockholders became concerned. They knew Golden Cycle controlled Elkton and other "satellite" companies (Cresson, United Gold Mines, Dr. Jackpot, New Gold Dollar, Empire Lee and Jerry Johnson) (T. 2180). The resignation of the Boards of each of these companies would leave the shareholders without representation (T. 2187). Not only did Lowry personally own stock in Elkton (he had been buying and selling Elkton for years) (Defs.' Ex. J, K, L, M and N), but he had many customers holding these securities (T. 2185).

There was no evidence that Lowry had ever had anything to do with the Elkton management prior to that time.

Lowry undertook the task of attempting to remedy a precarious situation. He conferred with a Mr. Goodman of Golden Cycle and requested that Boards be appointed

for the satellites. Goodman refused and advised Lowry to obtain legal counsel (T. 2187). This was before the June 14, 1965 foreclosure date and sale. Shortly after the foreclosure proceedings, Lowry did obtain counsel, but nothing came of it (T. 2187, 2188).

Up to the end of August or first part of September, 1965, when Lowry first met Lowther, everything was at a organization expert" (T. 2189).

Nothing of significance took place at the first meeting of Lowry and Lowther, although Lowry did mention the Golden Cycle problem (T. 2189). Lowry checked on Lowther through the president of the First National Bank of Colorado Springs, a Mr. Chase Stone, who verified Lowther's success with the rehabilitation of a Denver firm called Aircraft Mechanics (T. 2192, 2193). Later, Lowry personally checked out Lowther with the Securities and Exchange Commission in Washington (T. 2198).

A second meeting with Lowther concerned another matter (Cryogenics of Denver and a Mr. Jett) (T. 2190). Sometime near the end of September, 1965, Lowther called Lowry and told him that through a former Golden Cycle attorney, he had prevailed upon Golden Cycle to appoint Boards for the satellite corporations. Permission was obtained and Lowry picked up the books and records of the various satellites including Elkton, Cresson and United Gold Mines (T. 2194). At that time Cresson held 455,000 shares of Elkton, while United Gold Mines owned 1,024,753 shares.

Lowry then organized temporary Boards for these three companies which were approved by the old Boards (actually the Golden Cycle Board) on September 29, 1965. The purpose of the temporary Boards was to see what could be done to salvage the corporations. At that time the as-

sets of Elkton consisted solely of redemption rights to its mining properties in the Cripple Creek area.

There was no evidence of what had taken place between September 29, 1965, and November 2, 1965, with reference to Lowry. On the latter date a management contract between Elkton and El Paso Management Corporation was executed (Govt.'s Ex. 12), but it was not approved by the Elkton Board until November 15, 1965 (Govt.'s Ex. 66C), after Lowry had resigned (T. 2201). Lowther had formed El Paso (T. 2197). The contract clearly defines the objectives and purposes of El Paso, and the doubts held by Elkton and El Paso as to the future prospects of Elkton. It was shown that Lowry had nothing to do with the forming of El Paso (T. 2203).

On November 6, 1965, the Cresson and United Gold Mines Boards passed resolutions authorizing the sale of their Elkton stock for $.001 a share to not more than 20 purchasers (Defs.' Ex. A and B) (T. 2202). It was undisputed that the stock had sold for that price as late as May 5, 1965, when Lowry had purchased a large block from Harris Upham & Co. (Defs.' Ex. W, W1 and W2; V, V1 and V2). See also Defs.' Ex. E. Marilyn T. Lowry, defendant's wife, purchased 450,000 shares at this price for the family investment account. This account had been in existence during their entire marriage (T. 2209).

On November 9, 1965, Lowry resigned from all the Boards (T. 2201). On or about November 13, 1965, he mailed a "tender offer" letter (Govt.'s Ex. 90) (T. 2204). In that document Lowry carefully delineated the facts concerning the Golden Cycle foreclosure, the resignation of the interlocking directors, the appointment of a new Board composed of temporary members, naming them, and the Board's objectives. The El Paso contract was fully discussed and the reasons for the employment of that firm.

He went into the redemption problems and the expiration date of December 14. He advised that there was no assurance that the foreclosed property could be saved for Elkton shareholders. He pointed out that the mine properties were Elkton's sole remaining assets, and that the shares could become worthless. He made an offer to purchase Elkton shares at $.0025. The letter quotes the market correctly at $.0025 bid and $.01 asked, a very wide spread. At that time Lowry had an inventory of 112,032 shares (Govt.'s Ex. 20-33). (He still had an inventory of around 200,000 shares at the time of trial) (T. 2226).

As a result of response to the letter, Lowry purchased approximately 240,000 shares (T. 2208).

On December 2, 1965, the permanent Elkton Board was appointed by the three remaining members of the temporary Elkton Board (Leitzell, Bohn and Ballantyne). It was never established that Lowry had anything whatsoever to do with the selection of the permanent Board, or that he was more than only casually acquainted with its members. While the temporary Board approved the minutes, it is clear from all of the testimony that Lowther made the actual selection of permanent members.

On December 4, 1965, there appeared the first of the market letters relied upon by the Government to link Lowry with a scheme to defraud. This document (Govt.'s Ex. 92) points out that El Paso had taken over the management of Elkton, a dormant gold mining company for 20 years. It further related that Elkton had announced that: (1) the mining properties would be redeemed; (2) 51 percent of Chem-Spray had been purchased by Elkton (it had actually purchased 25 percent with an option to purchase an additional 26 percent, which was corrected in the December 31 market letter); (3) Elkton was negotiating for the acquisition of Econ-O-Car Rentals and that

Econ-O-Car was Chrysler's new entry into the national car rental business; (4) that a third probable major acquisition was under negotiation; (5) that El Paso was aiming for a cash flow income for Elkton well over $100,000.00 a year; and (6) that Elkton's activities could result in the penny stock becoming the "stock of the year" for 1966 profits.

On December 8 and 9, 1965, Elkton issued two optimistic news releases (Govt.'s Ex. 101 and 102).

Market activity in Elkton immediately picked up (Govt.'s Ex. 20-33), not only in connection with Lowry's business, but other securities dealers as well (B. J. Leonard & Co., Boettcher & Co., Harris Upham, Birkenmayer & Co.). The price of Elkton advanced from $.02 on December 6, 1965, to $.045 at the time of the Jolkovsky sale (Count I), a price the stock had reached on a number of occasions prior to December 15, 1965 (Defs.' Ex. O).

A brief resume of the market letters prepared and mailed by Lowry subsequent to the December 4, 1965, letter follows:

December 31, 1965 (Govt.'s Ex. 93): Lowry pointed out that the best gains in December were Elkton Company, and others. He states the fact that the shares had advanced steadily during December and that the new Board of Directors had announced several car rental acquisitions. It is also stated that the Elkton Company had purchased 25 percent of Chem-Spray instead of 51 percent (see December 4, 1965, letter), but had an option to purchase an additional 26 percent interest. Lowry made it clear that the brief experience with Elkton's new Board made investment appraisal early at that date. It was also pointed out that the redemption of the Elkton mine was passed in favor of other developments. Major points of current interest were said to include the appointment of

Bennett T. Martin to the Elkton Board, the fact that a major acquisition of an established business was being negotiated and that an audited statement was expected in a few months.

January 22, 1966 (Govt.'s Ex. 94): In this letter Lowry stated that more than 380,000 shares had been traded during December, and that less than 5,000,000 outstanding. Management was reported to be working on several "deals", and that successful completion of any one or two of the larger acquisitions contemplated could make the current market price look cheap. He said that orders "at market price" were recommended for speculative or risk venture funds. He also reported the redemption of the Jerry Johnson mine financed by the Elkton Company. The lease was also referred to.

February 19, 1966 (Govt.'s Ex. 95): In this market letter Lowry reports that the Jerry Johnson mine was leased to the Elkton Company, that the Jerry Johnson Gold Mining Company had approved a management contract with El Paso, but that it was too early to predict what El Paso had in mind for Jerry Johnson. He also reported that Elkton Company stockholders were meeting February 26.

March 19, 1966 (Govt.'s Ex. 96): Lowry reported that the Elkton Company shareholders' meeting on February 26 was met with a growing list of acquired interests. He then quoted press reports concerning the acquisition of Solar Airlines, Hasty House, and Accounting Management. The press reports were in quotes.

April 18, 1966 (Govt.'s Ex. 97): Lowry noted that "buy" interest was heavy, causing him to check with the management to determine if any news was pending. Getting a negative report, he said that the current price level appeared "possibly overvalued". He also pointed out that

Elkton's current income, while unreported, was believed to be extremely small "if in the black". A few bad credit reports were rumored, and he noted the turnover of Elkton employees was high. He was of the opinion that the market was well ahead of actual company growth: "Risk will remain high until solid earnings are attained." He recommended partial or full profit taking as prudent. Then, in what was proved to have been added later, he said, "SEC suspended trade 10 days starting 4:30 p.m. today—suspected misrepresentation."

Mrs. Jolkovsky (Count I), testified generally with respect to receiving the Lowry market letter of December 4, 1965, writing a letter to Lowry dated December 7, 1965, sending a check in the sum of $120.00 along with that letter, the Lowry Investment confirmation of December 11, 1965, her letter of December 13, 1965, to Lowry, and the receipt of the stock certificate on December 15, 1965, for 2,500 shares at $.045. She also testified concerning an open order for 10,000 shares at $.04 dated December 15, 1965, which was never consummated (T. 380-392, 447).

She received the Elkton stockholders' letter of December 8, 1965, and that of January 27, 1965. Sandwiched in between this evidence was her testimony concerning the Lowry market letter of December 31, 1965.

She was permitted over objection to detail her dealings with Scanlon & Company and Sudler & Company (T. 395-400, 404, 405, 423, 424, 463, 465, 470, 473, 477). Not only was she allowed to relate a great deal of detail concerning these transactions, but a number of documents having no bearing on Lowry whatsoever were received into evidence such as the Scanlon and Sudler confirmations (Govt.'s Exs. 1N and 1R). No relationship was shown with respect to Lowry or Lowther.

She also testified concerning news articles which she said she had received from Elkton and Scanlon & Company (T. 410, 411, 412).

She was permitted to give her interpretation of the various market letters, and her impression of the language contained therein, although she substituted the word "would" for "could." (T. 413, 414).

The Government not only persisted in trying to establish that this lady had relied upon the various documents, but drew out what had purportedly "impressed" her about the various documents in evidence including newspaper articles (T. 447-451, 459, 468, 477-479). This witness was allowed to testify that she associated Lowry with Elkton (T. 476). She testified that she felt she had more information than Scanlon and therefore did not take the advice of one of its stockbrokers. In fact, she even second-guessed the Lowry market letter of December 4, 1965. Her transcript reveals an optimistic attitude hardly warranted by anything contained in Lowry's market letter of December 4, 1965. She simply refused to consider the caveats.

The Government was permitted to ask her a series of questions concerning the various acquired companies and their financial condition, and as to whether or not the Defendants had ever told her these facts (T. 479-482). She had never had any conversation with any of the Defendants and relied upon the information contained in the various documents only.

In substance, Mrs. Jolkovsky testified that she made two purchases from Lowry (December 15, 1965, and May 14, 1966). She also made two purchases from other brokers on January 10, 1966 (Scanlon and Sudler).

On cross-examination this witness indicated she was not a naive investor (T. 483, 484). She was holding stock

in Golden Cycle at the time she purchased Elkton (T. 485). She admitted her investments in Elkton were speculative "to a certain extent" (T. 485, 486). She went to Scanlon and Sudler because she could get a better price for such stock (T. 487). She had been told by someone at Scanlon's that the stock was "very speculative", but she didn't take such advice because she "Had more information than he did" (T. 488, 489). She admitted she had received Lowry newsletters over the years and that they contained predictions and opinions concerning all types of mining stocks. She knew as an investor that an investment company does that sort of thing for its customers (T. 490, 491). She stated that she still felt that Lowry's enthusiasm at the time was to benefit the public and that he was sincere (T. 492). She also knew that Lowry was selling Elkton as a "principal" and knew what the term meant (T. 496). She also testified that she thought Lowry was "guaranteeing the stock" (T. 497, 498). She went so far as to say that even though Lowry had stated in his January 22, 1966 market letter (also called newsletter throughout the testimony, Govt.'s Ex. 94 "orders at 'market price' are recommended for speculation as risk venture funds," she disagreed (T. 517). In the beginning, she testified, it was her "impression" that "all of this was a gamble." (T. 527).

Howard Kuhnle (Count Five) testified that he had purchased 5,000 shares of Elkton at 3-1/2 cents on December 7, 1965, for $175.00. He received the December 4 and December 31 market letters, as well as the Elkton stockholders letter of January 27, 1966. He knew the stock was speculative, had invested in it before, and also was aware that the stock was in the high risk category. He had been receiving Lowry's investment bulletins and was shown to have been on the Lowry mailing list (Defs.' Group Ex. U). In fact, he had seen Mr. Lowry during the summer of 1965

in an effort to ascertain what was going on with Elkton. He had also received market letters before December 4, 1965 (T. 930-961).

Emil Andres (Count Three) had little to offer. He had received the December 4, 1965, market letter, and had read it in its entirety. He purchased 2,500 shares of Elkton for $112.50. He agreed that no promises were made, and finally said he did not depend entirely upon the market letter, but also upon the recommendations of Homer Rogers (Count Four), who did not testify (T. 962).

Roy Dickson (Count Two) testified that he received the Elkton shareholders letter of December 8, 1965. He had owned Elkton stock before, having purchased 1,000 shares on March 15, 1951, and another 1,000 shares on November 3, 1960. He testified that he talked to someone in the Elkton office, and purchased the stock relying on that person's representations, the December 8, 1965, shareholders letter, and things he read in the newspapers. He purchased 5,000 shares at $.065 on December 29.

Dickson, who was shown to be on the Lowry mailing list, did recall receiving and reading the investment bulletins. The fantastic spread of Elkton between 1962 and 1965 is clearly shown in the 1965 bulletin (Defs.' Ex. E) (T. 1314-1374).

The last of the substantive count witnesses was Claudius Fingar (Count Six). It was not clear what the Government was trying to prove here since it appeared that Fingar was involved in personal financial problems, and was looking for some sort of fast profit. He did not rely upon anything, and had dealt with Lowther only, having given him a check and a note for the purchase price (T. 1155-1175, 1506-1510) (Govt.'s Ex. 6A and 6B).

J. Paul Ballantyne, a professor of economics, testified concerning his purchase of 172,417 shares of Elkton through John Colbrunn, a close friend whom he designated as nominee, and the subsequent sale of such stock at a profit. He served on the temporary Elkton, United Gold Mines and Cresson Boards. Much of this witness' testimony related to signing minutes and consent actions of the Boards without actual meetings. The trial judge later instructed the jury that it was perfectly proper for a corporation to "make" Minutes of meetings without the presence of the directors (T. 2475). Ballantyne resigned on December 2, 1965.

He testified that Lowry was one of the individuals who had taken the lead in trying to salvage the companies. The purchase and sale were his own decisions, and that Lowry did not control what he did (T. 55-116). Even the court commented that it appeared that Lowry made no profit from the purchase and sale by Ballantyne of his stock through his nominee (T. 81).

Byron E. Simpson, a securities dealer of 50 years' experience, himself owned Elkton, had been concerned with the foreclosure proceedings, and had assisted Lowry in forming Boards. He served as a temporary member when the original members resigned. He sold 59,355 shares to Lowry in response to the tender offer letter (Govt.'s Ex. 90). He also testified that efforts had been made by himself and others to save the companies, including Elkton. These people did not include Lowry. They were unsuccessful (T. 220, 221). He testified with respect to the good faith of Lowry, and further, that Lowry was not a "market maker" (T. 233). This term connotes one who has such an inventory of a particular stock that he can control the market by buying and selling. The Government never disputed Simpson's testimony.

Another temporary Board member, Robert Leitzell, also testified. Much of his testimony concerned the fact that no meetings were held. He also made deprecating remarks concerning Elkton stock. This witness misinterpreted the El Paso contract to provide for a $100,000.00 yearly fee. The contract terms themselves refuted this (Govt.'s Ex. 12). This witness also testified that as a member of the Cresson and UGM Boards he did not authorize, nor would he authorize, the sale of its stock at $.001. It was established that he had in fact done just that (Defs.' Ex. A and B) (T. 118-176).

John Bohn, one of the five members of the temporary Boards, testified that he served on these Boards to help stop the foreclosure. He also testified as to the good faith of Lowry, that he read all the minutes, and was asked by Lowry to sign them "if I wanted to". With respect to Cresson and UGM authorizing the sale of Elkton at $.001, he testified that he approved the minutes and resolutions after reading them. He also read the El Paso contract and approved it. He was one of the last three members of the Elkton Board which approved the permanent Board. He himself had purchased 1,000 shares of Elkton from Lowry in 1964 (T. 324-377).

George Apostales testified on behalf of the Government. He had been a salesman employed by Lowry (T. 1053). He knew about them before he was hired since it was listed on the Colorado Springs Stock Exchange (T. 1054). When he heard of the Golden Cycle problem, he suggested that Lowry look into it (T. 1061). This witness made a number of claims in an effort to implicate Lowry and was a difficult witness to control because of his failure to respond to questions put to him and his eagerness to volunteer statements. A number of claims made by him were refuted. For instance, during his lengthy testimony,

he claimed Mr. Leitzell was placed on the temporary Boards without Leitzell's approval (T. 1067). Mr. Leitzell did not so testify. This witness also swore under oath that he was never a member of the Colorado Springs Stock Exchange (T. 1090, 1122). This assertion was clearly refuted (T. 1129, Def.'s Ex. H).

He testified concerning Elkton's acquisition of Chem-Spray as though Lowry and Leitzell were involved, and that Leitzell had questioned the legality of such acquisition. The evidence was clear that the permanent Board had made the acquisition which Board did not include Leitzell or Lowry, nor was there any evidence that Lowry had anything whatsoever to do with such acquisition (T. 1071, 1072). Apostales insisted that the management contract between El Paso and Elkton provided for a fee of $100,000.00 a year although the terms of the contract clearly provided for a fee of $10,000.00 a year (T. 1074) (Govt.'s Ex. 12). Other misstatements were made by this witness which can be easily gleaned from the record, and apparently incensed one juror. (See note to Judge concerning this witness and the argument of the District Attorney:

"Dear Sir,

"One of our jurors was convinced of his verdict before leaving the courtroom due to statements made by the District Attorney and one witness, Mr. Apostalis (sic)?

"This has made it impossible for the remaining jurors to go any further.

"Please consider alternate juror and advise.
"Sincerely, J. E. Dean.")

He then admitted that he himself had purchased a block of Elkton stock and had sold it at a nice profit (T. 1107).

Lowry did tell him that he depended upon his sources for the information he put in his market letters (T. 1086).

On cross-examination this witness admitted that he also had tried to solve the Golden Cycle problem (T. 1120).

VI.

EVIDENCE AGAINST LOWTHER AND COURTS

Much testimony and many exhibits were offered against Lowther and Courts, which compelled the court on numerous occasions to advise the jury that such evidence was not to be considered in connection with Lowry. Objections were made to all this evidence. Without minutely examining each exhibit and the voluminous testimony of the witnesses, in substance, they testified as follows:

1. *Jack Wells*: This witness was the Cripple Creek banker who had dealt solely with Lowther. He did not know Lowry. He made a $4,000.00 loan to Elkton. There had been some negotiations with respect to the purchase by Elkton of the Cripple Creek bank. He was also concerned with the acquisition of Solar Airlines and had gone to Roswell, New Mexico, with Lowther. No connection whatsoever was shown with Lowry (T. 258-322).

2. *Bennett T. Martin*: He was a Lincoln, Nebraska, businessman, who served on the permanent Board. He did not know Lowry. What little dealings he had with Elkton were concerned solely with Lowther or El Paso (T. 565-618).

3. *Ralph Jones*: Jones was a Cripple Creek banker who testified with reference to the accounts of Hasty House, Elkton, Chem-Spray, El Paso, Rocky Mountain Rent-a-Car, and Lowther personally. The depletion of such accounts by Lowther was made painfully clear. There

was no connection here whatsoever with Lowry (T. 622-638).

4. *John McCall*: This witness was a Denver public relations man who had been retained by El Paso, but his testimony only related to releases dated December 8, 1965 (Govt.'s Ex. 101), December 9, 1965 (Govt.'s Ex. 102) and March 3, 1966 (Govt.'s Ex. 104). He was also queried with respect to Govt.'s Ex. 100, which was a list of newspapers for such news releases. He testified that J. Hamilton Gregg was his source of information. His testimony did not relate to Lowry whatsoever, but the prejudicial effect of the exaggerated claims on Lowry cannot be overlooked (T. 640-661).

5. *William N. Campbell*: This witness was the President and principal owner of Rocky Mountain Rent-a-Car. Although his testimony was quite lengthy, because of the question of whether or not this company was on a sound financial basis, and had made any money, again, there was no reference whatsoever to Lowry. Campbell was one of the permanent Board members. He testified at length concerning his relationship and friendship with Lowther and Courts, but never once did he ever refer to Lowry (T. 672-741).

6. *Peter J. Prato*: This witness testified concerning a loan of $10,000.00 he made to one J. C. Danielson on April 16, 1966, which had nothing whatsoever to do with Lowry. The stock was put up as collateral, but quickly sold by Prato (T. 742-751).

7. *Clarence L. Johnson*: This witness was an officer or custodian at the Central Bank and Trust Company who testified as to the purpose of the Prato transactions. He testified concerning a check of Mr. Prato for $10,000.00 made payable to J. C. Danielson. Ten $1,000.00 checks

were then purchased made payable to H. Allen Lowther (Govt.'s Ex. 72-81). He read endorsements on these checks which showed that they were endorsed by Lowther to Margaret B. Lowther (Govt.'s Ex. 71-78), to a Colorado Springs bank (Govt.'s Ex. 79), and to El Paso (Govt.'s Ex. 80 and 81). Lowther was thus able to obtain $10,000.00 by putting up stock through J. C. Danielson. Again, no connection with Lowry was shown (T. 755-763).

8. *Robert W. Morton*: This man was once employed by Chem-Spray. He testified with respect to his employment by J. Hamilton Gregg, an investment he made in Chem-Spray, the fact that a Chem-Spray check was returned for insufficient funds, that he had examined its books and records, and generally found that the company was in bad financial condition. This testimony related more to J. Hamilton Gregg than anyone else. The statements he attributed to Gregg could not possibly be related to Lowry, nor was any of his testimony (T. 764-809).

9. *Richard Baker*: This gentleman was an insurance broker who sold insurance to Lowther and took 80,000 shares of Elkton stock to pay Lowther's bill which was in default. He sold these shares to Boettcher & Company, netted $5,200.00 on the sale, credited the account, and gave the residue to Lowther. Courts had picked up the check. There could be no relationship between this witness and Lowry, nor was any claimed (T. 814-825).

10. *Alma Gordon*: This lady was a securities dealer employed by B. J. Leonard & Company. She said she saw Lowry just once, and that was at the February 26, 1966, Elkton shareholders meeting where other brokers were present besides him. She testified that she had handled two large blocks of 100,000 shares each for Lowther and had issued checks to the Jumarde Trust. She had con-

versations with Lowther, and at one time had been asked by him to represent Elkton in making contacts with New York brokers. She was to tell the "Elkton story" and that the company was making great progress. She testified she relied upon the representations of Lowther. At one time she was contacted by Lowther with respect to disposing of an additional 200,000 shares. She did not place the stock privately as he suggested, but returned it to him after keeping it from ten days to two weeks. Apparently, she was the person who suggested that Lowther contact J. C. Danielson (See Prato deal.) Again, whatever conversation she had with Lowther, and whatever transactions she handled, no connection whatsoever was shown to Lowry (T. 825-858).

11. *D. W. Ohlson*: This witness was employed by Lowther in 1965 to manage Rocky Mountain Rent-a-Car. He said the company was making some money during the summer and fall of 1965. He received Elkton stock from Lowther in December or January of 1966. He was also employed to find good prospects for acquisition. He testified that he received stock from Lowther from time to time. While his testimony could be set out in more detail, it is clear therefrom that there was no relationship here whatsoever with Lowry, nor was Lowry ever mentioned. This witness was strictly concerned with the relationship between himself and Lowther, Rocky Mountain Rent-a-Car, and Elkton (T. 860-881).

12. *J. D. Hill*: Hill, a former radio station owner from Colorado Springs, did not know Lowry, but had met Lowther sometime before in Hutchinson, Kansas. He was concerned with an analysis of Hasty House, and became an officer of Elkton. He testified primarily about his suspicions that Hasty House was not a going concern. He also recommended that no more money be put into Chem-

Spray after he analyzed its books and records. He purchased some stock in Elkton, and was given 100,000 shares by Lowther. Again, nothing in his testimony could be construed as bearing in any manner on Lowry (T. 882-922).

13. *Robert Calvin Bennett*: This gentleman was associated with Arthur Anderson & Company. He was allowed to testify that Arthur J. Anderson & Company had never become auditors for Elkton as had been represented. He had written a letter dated April 19, 1966 (Govt.'s Ex. 132), to Lowther which in the strongest terms demanded that Lowther cease and desist from representing that his firm was to be their accountants. This testimony and the letter itself was clearly hearsay as to Lowry, and no connection was shown (T. 923-928).

14. *George Henson*: This witness testified that Courts and Lowther told him they would like him on their "team". He said Mr. Courts gave him 25,000 to 35,000 shares of stock. He was out of work at the time, and felt he could sell the stock at a profit. His whole relationship with these gentlemen took place within a 30-day span. His testimony was very confusing, but indicated that he was in some fashion concerned with the sale of 25,000 shares of stock at $.07 per share on April 13 and April 14, 1966, for the benefit of Lowther (Govt.'s Ex. 120A). No relationship whatsoever was shown to Lowry. Again, it was a private Lowther transaction (T. 977-1008).

15. *Harold Sasaki*: Sasaki was a cashier for Sudler & Company in 1965 and 1966. He testified with respect to Govt.'s Ex. 125F, a position record of Sudler covering the period from December 31, 1965, to December 14, 1966. This record pertained to Elkton stock. No relationship whatsoever was shown to Lowry (T. 1013-1034).

16. *Harlan O. Roberson*: This witness was an officer of Pikes Peak National Bank in Colorado Springs. He had made a loan to Lowther on September 3, 1965, and another one on October 7, 1965. They totalled $4,609.24. Upon default, 50,000 shares of Elkton stock put up as security was sold. 40,000 additional shares were returned to Lowther. Again, this was a private transaction involving Lowther and El Paso which was not shown to have any bearing whatsoever upon Lowry (T. 1034-1050).

17. *Ronald Weaver*: This witness was a cashier at Boettcher & Company. He testified as to certain position records which had no relationship to Lowry.

18. *Harold E. Littrell*: This witness was Vice-President of the Exchange National Bank. He testified with respect to El Paso signature cards and other matters concerning El Paso only. He also identified a Colbrunn check (Govt.'s Ex. 129A) which the court limited only as to Lowther and Courts (T. 1195-1204).

19. *Roger Nittler*: This witness was a certified public accountant who examined the Chem-Spray books at the request of J. Hamilton Gregg for the period ending June 30, 1965, and September 30, 1965. He submitted unaudited statements which were marked Govt.'s Ex. 133 and 133A, respectively. These exhibits were rejected by the court when offered into evidence, but the witness, over objection, was permitted to read from them. Again, no connection with Lowry was shown by this witness' testimony. A motion to strike this testimony was denied (T. 1205-1224).

20. *William Nichols*: Nichols was a collection agent for the Internal Revenue Service. He testified solely with respect to liens against Solar Airlines which were not connected in any fashion to Lowry (T. 1225-1234).

21. *Lewis Murchison:* This witness was employed by El Paso as a transfer agent from January to March, 1966. He testified with respect to the technical aspects of making the transfers, issuing certificates, transferring the shares from the old Elkton transfer book (Govt.'s Ex. 40) to some unknown ledger cards, and then from them to the stock certificate books (Govt.'s Ex. 41-44). His testimony was the basis for the Govt.'s Ex. 39, 39A and 39B (Summaries). (T. 1235-1291, 297-1298, 1375-1490).

22. *James L. Owsley:* This witness was a securities dealer who dealt freely and in large volumes in Elkton stock. In fact, his company purchased well over 200,000 shares of Elkton in the name of nominees from December 23, 1965, to about January 17, 1966. No relationship to Lowry was ever established or claimed (T. 1491-1505).

23. *Ernest Gottman:* This witness, an officer of Elkton from December 2, 1965, to the present time, testified concerning the news releases, the stock-holders letters, and his knowledge of the financial condition of Chem-Spray and Rocky Mountain Rent-a-Car. He had been in business as the President of Econ-O-Car. His testimony related solely to these subjects, and did not concern Lowry at any time. In fact, while this should have no relationship to Lowry because of the paucity of his testimony relating to Lowry, if there was any scheme here, this gentleman had much to do with it. In any event, he made it clear that after his entry into the Elkton family on December 2, 1965, he, Lowther, and the other officials of the various companies involved, as well as the Board of Directors, ran Elkton, and that Lowry had nothing to do with their practices, procedures and transactions thereafter, or at any other time (T. 1727-1902).

Lowther took the stand on his own behalf. It was brought out by his counsel that Lowther had been convicted of a felony. The remainder of his rather detailed and extensive testimony, accompanied by numerous exhibits, had little to do with Lowry. He corroborated the undisputed testimony concerning his relationship with Lowry and the various Boards up to the formation of the permanent Board on December 2, 1965. From then on his testimony concerned Courts, Gottman, Campbell, Chem-Spray, Rocky Mountain Rent-a-Car, Solar Airlines, a number of leases he claimed to have had, and the numerous transactions he had concerning these companies, various individuals, banks, et cetera. Lowry was a complete stranger to this testimony (T. 1905-2067).

VII.

ARGUMENT

A. The trial court's denial of Lowry's repeated requests for a separate trial amounted to a denial of a fair trial.

The indictment herein contained six substantive counts, and, as is the practice in most districts, it also contained a charge of conspiracy to commit the substantive offenses as a seventh count. While the conspiracy count was dismissed by the Government immediately prior to the trial, it had little effect on the Government's strategy. Since the indictment involved a scheme to defraud, and a scheme differs little semantically from a conspiracy to commit fraud, the Government's proof in the case proceeded along the classic lines of a conspiracy trial. At the end, after four weeks of testimony which followed two distinct and separate tangents with respect to Lowther and Lowry, the court instructed the jury that if they found an unlawful scheme, "*then in that event you may consider*

as to those participating defendants all the acts, omissions, declarations or statements made by any and all of such participants in the unlawful scheme." (Emphasis supplied). The hearsay exception allowed in federal conspiracy trials, the limits of which have never really been defined by the Court in the exercise of its rule-making powers in the field of federal evidence, was thus utilized in all of its pervasive, elastic and unlimited splendor. As a result, as will hereinafter be more particularly argued, a potpourri of individualized acts and omissions, not connected in any fashion to Lowry, were permitted to be used against him, and clearly resulted in his conviction.

The court denied Lowry's Motion for a Separate Trial under Rule 14, Fed. R. Crim. P. before the presentation of evidence. Thereafter, during the course of the trial, the motion was renewed and again denied. The court then instructed all counsel that they need not file further motions since the court was aware of his duties under the rule, and could grant a severance at any time. This is true since it is well settled that the trial judge is under "a continuing duty at all stages of the trial to grant a severance if prejudice to a particular defendant is made manifest". *Schaffer* v. *United States,* 362 U.S. 511, 516. However, the severance was never granted, and we firmly believe that because of such failure Lowry was prejudiced to such an extent that he did not receive a fair trial.

We have heretofore listed the many witnesses who testified with respect to Lowther and Courts, and whose testimony did not have the remotest connection with Lowry. Much of this testimony was strongly incriminating to Lowther particularly, and must certainly have reflected upon his good faith. The court admonished the jury on numerous occasions at the request of Lowry's counsel not to consider such evidence in connection with Lowry, but

it is our position that since there was so much of such evidence, and such an abundance of behind-the-scenes private dealings on the part of Lowther, and the evidence so substantial as to him, while just the opposite as to Lowry, that all of the admonitions the court could conceivably muster, though in the strongest terms, could not erase such evidence from the jury's minds. Furthermore Lowry was literally buried under the mass of documentary evidence offered against Lowther and Courts. See Appendix B.

No connection between Lowry and these exhibits was ever shown, nor could it be shown, but Lowry's counsel was compelled to sit silently through the testimony of witness after witness completely powerless to do anything about the incriminating testimony going in against Lowry's Co-Defendants.

Particularly prejudicial were the following exhibits: Elkton shareholder letters of December 8, 1965 (Govt.'s Ex. 98), and January 27, 1966 (Govt.'s Ex. 1-X); the McCall Agency news releases of December 8 and 9, 1965, and March 3, 1966 (Govt.'s Ex. 101, 102 and 104); the Central Bank cashier's checks to Lowther, each in the sum of $1,000.00 (Govt.'s Ex. 72-81); the B. J. Leonard checks of February 18, 1966, to Lowther (Govt.'s Ex. 116); the five Ohlson checks to Lowther (Govt.'s Ex. 117, 117A-D); to Jumarde Trust purchases and sales (Govt.'s Ex. 121, 121A-E); the letter from Lowther to Robinson (Pikes Peak Bank, Govt.'s Ex. 125A); and the documents relating to the bank's sale of the stock to cover Lowther's defaulted loan, with the remainder going to Lowther (Govt.'s Ex. 125B-125E); the closing of Lowther's various bank accounts; the letter from R. C. Bennett (Arthur Anderson & Co.) to Lowther which contained strong prejudicial language (Govt.'s Ex. 132); and the letter to Gottman

read but not offered into evidence concerning the disposition of automobiles. Falling somewhere in between was the testimony of Roger Nittler, who had been retained by J. Hamilton Gregg, President of Chem-Spray, to make an informal audit of its books for the six-month period ending June 30, 1965, and the three-month period ending September 30, 1965. With no connection being shown to Lowry whatsoever, this witness was permitted to read from hearsay documents without any foundation being laid for them: He did not have his original books and records (Govt.'s Ex. 133 and 133A). The court refused to admit these documents into evidence, but let the reading therefrom stand by denying a motion to strike. Hence, these hearsay documents might as well be in evidence (T. 1219).

Without further belaboring this point, we note that the attached list of exhibits indicates the magnitude of the documentary evidence offered against Lowther.

Furthermore, Lowther introduced sixty-two exhibits, none of which had anything to do with Lowry.

We strongly urge that while the evidence against Lowther was substantial, that against Lowry was not. This sets the stage for the typical situation where severance is appropriate. A similar situation arose in *United States* v. *Kelly*, 349 F.2d 720 (C.A. 2), another securities case. We quote from Syllabus 9:

> "The refusal to grant severance requested by defendant during course of lengthy trial involving charges of conspiracy to defraud public by distribution of oil company stock at grossly inflated prices was abuse of discretion under circumstances involving length of trial, defendant's illness, and *applicability of much evidence solely to co-defendants.*" (Emphasis supplied).

In *United States* v. *Varelli*, 407 F.2d 735 (C.A. 7), the defendants were convicted of conspiracy and of substantive offenses involving a series of highjackings. Upon appeal after conviction, the court said:

> "*Kotteakos* and *Schaffer* also require that all the defendants be retried on the substantive counts since the overwhelming guilt as to some may have unduly influenced the jury as to others who were less involved. The court in *Kotteakos* stated that where the instructions were not proper, it was possible 'not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could not have affected some.'"

See also Schaffer v. *United States*, 362 U.S. 511, 522-524.

The danger inherent in a joint trial, particularly in a conspiracy type case, where the prosecution attempts to establish the necessary nexus by the introduction of often sprawling and far-flung evidence, was voiced by Mr. Justice Jackson in a concurring opinion in *Krulewitch* v. *Jackson*, 336 U.S. 440. Here the petitioner had been convicted of violations of the Mann Act and conspiracy to commit these offenses. The Justice said:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its merits in the minds of the jurors, who are ready to believe that birds of a feather will flock together. * * * There are

many practical difficulties in defending against a charge of conspiracy which I will not enumerate." (p. 454).

The Court pointed out as an example how a conversation by a prostitute with another person who was not on trial was received in evidence. This type of situation occurred time and again in the case at bar. The number of hearsay conversations as to Lowry received in evidence is almost beyond comprehension.

Justice Jackson added that the order or proof of so sprawling a charge is difficult for a judge to control:

> "As a practical matter, the accused is confronted with a hodgepodge of acts and statements of others which he may never have authorized or intended or even known about, but which help persuade the jury of existence of a conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *Blumenthal* v. *United States,* 332 U.S. 539, 559, all practising lawyers know to be unmitigated fiction." (p. 453).

This language was quoted with approval in *Burgett* v. *Texas,* 389 U.S. 109, 115 n. 7.

In *Nash* v. *United States,* 54 F.2d 1006, 1007 (C.A. 2), J. Learned Hand characterized the courts' attempts to confine evidence to one or another defendant as a recommendation to the jury of "a mental gymnastic which is beyond, not only their powers, but anybody else's".

In *United States* v. *Haupt,* 136 F.2d 661 (C.A. 7), six defendants were jointly indicted, tried and convicted of treason. Motions for severance were filed by the defendants before trial calling the court's attention to the fact

that all of the defendants were charged as principals in 41 different overt acts (in the case at bar there are 31 overt acts plus 10 paragraphs of general claims), many alleged to be committed by one or more, but not all. (A similar situation exists in the case at bar.) The defendants contended that this might lead to confusion and prejudice to those who had not participated in such overt acts. However, there was nothing before the court at the time but the motions and the indictments, and it was held that there was no abuse of discretion in denying the motions *at that time*. However, after the evidence was in which related to the background of several defendants, and a number of incriminatory statements made by them, upon consideration of the motion for a new trial, it was held that the defendants should have been relieved of the unfair prejudicial consequences of a joint trial. The court said:

> "Then the court had to consider the task of the jury, which had to keep separated in its mind the involvement of the various defendants in the numerous overt acts, to eliminate from the incriminating statements those parts which involved defendants other than the one against whom such statement was admitted, and to consider only as to such defendant the acts and utterances comprising the so-called background testimony as it related to such defendant. We think that had those facts been known to the trial court at the time the motion for severance was made, it would have been an abuse of discretion for the trial court to have refused a severance. When presented again in the motion for new trial when all of these facts and circumstances were known to the court, it was likewise an abuse of discretion to overrule such motion and thus refuse to remedy this prejudicial procedure." (p. 674).

Many incriminating documents were admitted against Lowther as well as impeaching statements made before the Securities and Exchange Commission. Bearing on this question, the court said in *Barton* v. *United States*, 263 F.2d 894 (C.A. 5), that it was an abuse of discretion not to order a severance where a co-defendant had made an incriminating admission. Of further importance is the fact that such statements of Lowther were made *after* the alleged scheme had run its course and therefore were inadmissable. *Dutton* v. *Evans*, 400 U.S. 74, 81.

In a similar vein it has been held that where the trial judge finds that a defendant has been unduly harmed or his trial made unfair because of evidence admitted against one or more of his co-defendants, the trial court should in the interest of justice grant a new trial. *United States* v. *Johnson*, 337 F.2d 180 (C.A. 4), *affirmed*, 383 U.S. 169; *United States* v. *Decker*, 51 F.Supp. 20, 25-26 (D.C. Md.).

In *Sims* v. *United States*, 405 F.2d 1381 (C.A. D.C.), three defendants were being tried for murder arising out of an attempted burglary. A motion for separate trials was denied. In reversing, the court noted that the trial court had to instruct the jury to disregard incriminating statements made by one of the defendants as to the others no less than fifteen times during the trial. This in itself required a severance. In the case at bar the trial court had to instruct the jury at least twenty-five times to disregard testimony as to Lowther and Courts.

It appears to be settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies *only* if the statement was made in the course of and in furtherance of the conspiracy. *Dutton* v. *Evans*, 400 U.S. 74, 81. If this rule had been

applied in the instant case, such evidence as Lowther's testimony before the Securities Exchange Commission, his use of stock to pay personal bills; his writing of short checks; and borrowing money from banks, as limited examples since there are many more, would not have been received in the case.

B. The trial court's instructions relating to the consideration of all of the acts, omissions, declarations and statements made by any and all of the participants in the alleged unlawful scheme to defraud deprived the Petitioners of a fair trial by Constitutional standards.

Inherent in the fair trial concept is the court's duty to clearly instruct the jury that the proofs against one defendant are not proofs against his co-defendants unless such proofs relate to statements and activities committed in furtherance of and in the course of the alleged scheme to defraud. *Dutton* v. *Evans,* supra. Instead, the court gave this instruction:

> "You will recall that during the course of the trial the Court instructed you as the evidence came before the Court and jury that certain of that evidence could be considered by you only as to a certain defendant or defendants unless and until the Court instructed you to the contrary. The Court now instructs you as follows:
>
> "The acts, omissions, declarations or statements of any one defendant are not to be considered by you as the acts, omissions, declarations, or statements of any other defendant unless and until you are satisfied beyond a reasonable doubt that such defendant has entered into the unlawful scheme to defraud, as alleged in the Indictment and that he was active, knowing, and a willful participant in such scheme at

the time that the act, omission, declaration or statement was made to bring about the criminal objective of the scheme.

"If you find from the evidence beyond a reasonable doubt that a defendant entered into the alleged unlawful scheme with one or more of the other defendants and knowingly and willfully participated therein with another defendant or defendants for the purpose of bringing about the criminal objective of such scheme, *then in that event you may consider as to those participating defendants all of the acts, omissions, declarations or statements made by any and all of such participants in the unlawful scheme.*" (Emphasis supplied).

The instruction is clearly in conflict with the applicable decisions of this Court, including *Dutton*, and those of other circuits.

In *Blumenthal* v. *United States*, 332 U.S. 539, 559-560, Mr. Justice Rutledge, speaking for the Court, concluded that each defendant was to be protected in joint conspiracy trials, and the obvious dangers to each minimized by "clear rulings on admissibility, limitations of a bearing of evidence as against particular individuals, and adequate instructions" and he added, "It is therefore extremely important that those safeguards be made as impregnable as possible." (p. 746).

In *United States* v. *Kelly*, 349 F.2d 720 (C.A. 2), the issue arose in the form of marshalling of evidence which in practical terms simply means instructing the jury as to which evidence applies to which defendant, and advise them how to consider such evidence. Even though counsel for defendants in *Kelly* expressly requested that the evidence not be marshalled, the Court of Appeals for the

Second Circuit held it was error not to do so. Apropos the case at bar, the Court said:

> "What were the safeguards for the protection of Shuck that the trial judge should have applied and made 'impregnable'? One not mentioned by Mr. Justice Rutledge in *Blumenthal*, which is peculiarly applicable in this case, was the granting of a severance as to Shuck the moment it appeared he was likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-defendants. Another was by making clear in the instructions to the jury that the proofs against Shuck were different from the proofs against Kelly and Hagen, pointing out what the difference was, as we have done in a few sentences, and making sure that Shuck was given separate and individual attention as distinct from Kelly and Hagen. A third safeguard was, by interim instructions and by positive and clear instructions at the close of the case, to give Shuck every possible protection against the use of prejudicial and inadmissible testimony and exhibits." (pp. 756-757).

The court continued:

> "In a case such as this one it was particularly important that the proofs be marshalled in such fashion as to place clearly before the jury the difference between the evidence against Kelly and Hagen and the evidence against Shuck on the single, overall conspiracy phase of the case. * * * The trial court should not have agreed to the request by counsel that this marshalling of evidence be omitted. * * * But one thing leads to another, and the failure to marshal the proofs probably led the trial court to an error so vital and so prejudicial to Shuck as to require reversal, despite the fact that the error was not noticed

or excepted to by counsel for Shuck. By his failure to realize that the state of the proofs was such as to justify the jury in finding that Kelly and Hagen were participants in the single overall conspiracy but that Shuck was not, the trial judge lumped them all together and gave the 'all or nothing' charge condemned by Judge Friendly in *United States* v. *Borelli*, 336 F.2d 376, 384-386 (C.A. 2)."

Moving from the question of marshalling the evidence to the instruction, the Court then quoted the instruction in full:

> "In analyzing the evidence you must determine whether there was a single, continuing overall conspiracy or separate, independent conspiracies with separate and distinct groups involved, with no overall central purpose. If you find separate conspiracies and that some of the defendants belonged to one and not to the other, then there would be no proof of a single conspiracy charged in the indictment; and in that case you must return a verdict of not guilty as to all the defendants on the conspiracy count." (p. 757).

The court then went on to hold that the giving of this instruction was error of such grave consequences to Shuck as to fall into the "plain error" category which must be taken into consideration even if not noted by counsel at the trial. The case was reversed.

In *United States* v. *Haupt*, 136 F.2d 661 (C.A. 7), a similar instruction was struck down, and required a reversal. There the court gave this instruction:

> "If you find from the evidence beyond a reasonable doubt that the defendants or any group of them agreed among themselves to commit any one or more of the overt acts charged in the indictment in the

furtherance of the treason charged, then the act of one of such defendants in furtherance of the common design became in law the act of all and all are charged with it." (p. 675).

The Court of Appeals pointed out:

> "The criticism of this charge is that it permits the jury to find one defendant guilty of an overt act committed by another, upon the theory of a conspiracy between them to commit such act. * * * As we read it, the jury was told that the act of one defendant in furtherance of a common design was the act of all and that all are charged therewith." (p. 675).

In *Della Paoli* v. *United States*, 352 U.S. 232, the Court approved the following language contained in the lower court's opinion:

> "Relevant declarations or admissions of a conspirator made in the absence of a co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the *declarant's* participation therein. (Emphasis by court.) The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. * * *
>
> "These declarations (i.e. those admissible only as to declarant) must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and their limitations put upon them." (p. 238).

In the instruction given in the instant case, the jury was given carte blanche to consider all the evidence whether it pertained to Lowry or not, whether it was in

furtherance of a scheme or not, or whether it occurred in the course of a scheme or not. No evidence was admitted on the ground delineated in *Della Paoli*. Also, this defect is clearly contrary to the teachings of *Dutton* and *Krulewitch*.

The jury was permitted to indulge in a process of reasoning backward condemned by Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, where he pointed out that a conspiracy often is proved by evidence that is admissible only upon the assumption that a conspiracy existed (p. 453). If the jury found a scheme here, they could enlarge their consideration of the evidence to include Lowry, but to find a scheme in the first place, it would appear that they would have to consider *all* of the evidence, most of which is admissible against Lowry only on the assumption that a scheme did in fact exist. How could they find a scheme otherwise? This is the danger of a joint trial, and was all the more reason why the evidence should have been marshalled, the jury carefully instructed so as not to give them cause for lumping all the evidence together to the unfair detriment of Lowry, and even more fair, there should have been a severance.

We admit that no objection was made by counsel. But Rule 52(b), Fed. R. Crim. P., provides as follows:

> "*Plain error.* Plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the court."

Hence, even in the absence of an objection, the appellate courts have the inherent power on its own motion, if necessary, to inquire into the adequacy of a charge in cases where there is grave error which amounts to a denial of a fundamental right. *Fischer* v. *United States*,

212 F.2d 441 (C.A. 10); *Madsen* v. *United States*, 165 F.2d 507, 510 (C.A. 10).

In *Troutman* v. *United States*, 100 F.2d 628 (C.A. 10), the court said:

> "Where life or liberty is involved, an appellate court may notice and correct a serious error which was plainly prejudicial without it being called to the attention of the trial court, even though it was not presented by assignment of error." (p. 634).

C. The extensive and indiscriminate use of hearsay testimony in a criminal case involving an alleged scheme to defraud, and the incomplete and inexact nature of instructions relating thereto, have reached such Constitutional dimensions so as to require the Court to intervene in the exercise of its rule-making powers.

The Petitioners feel handicapped since the Government may argue that this case involves a scheme to defraud and not a conspiracy to commit the substantive offense. It is our position that there is no discernible difference in how the two charges are tried, and the method of offering proof thereof, and that the growing concern of the courts with respect to the proof allowed in conspiracy cases is equally appropriate in cases where the charge is a scheme to defraud.

This Court has expressed concern. In *Kotteakos* v. *United States*, 328 U.S. 750, 773, the Court said:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to a substantial right has not taken place."

The Court also pointed out that the mounting guilt of one is likely to affect another. Finally, the Court recognized that conspiracy presents perplexing problems that have long concerned the courts (p. 524). See also *Krulewitch* v. *United States,* supra, and *Della Paoli* v. *United States,* supra.

Mr. Justice Jackson, in his concurring opinion in *Krulewitch,* pointed out that the case illustrates a "present drift in the federal law of conspiracy which warranted further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense." (p. 445). In *Della Paoli* the Court reacted in a similar vein when it approved this language in the lower court opinion:

> "Even then (it had previously laid down certain ground rules relating to the admission of hearsay evidence) in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted, and in some instances for what specific purpose." (p. 238).[2]

The courts are not alone in their concern for the problems created by the federal law of conspiracy. See Annual Report of Attorney General for 1925, pp. 5-6; O'Darugherty, Prosecution and Defense under Conspiracy Indictments, 9 Brooklyn L. Rev. 263; Developments in the Law: Criminal Conspiracy, 72 Harvard L. Rev. 920, 980-983; Note, Guilt by Association—Three Words in Search of a Meaning, 17 U. of Chi. L. Rev. 148; Note, The Conspiracy Dilemma, Prosecution of Group Crime and Protection of Individual Defendants, 62 Harvard L. Rev. 276.

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2. 229 F.2d 319 (C.A. 2).

It is respectfully urged that the Court in the exercise of its rule-making powers and powers of supervision, can no longer permit the concept that guilt is personal to become diluted and meaningless by loose lax procedures in the trial courts. *Schaffer* v. *United States*, 362 U.S. 511-522. The instruction given in this case is a prime example of how easily the conspiracy and scheme to defraud exception to the hearsay rule can grow from a mere evidentiary rule to a problem of Constitutional dimensions. The practical problems of proof in such cases do not call for methods of solution which deprive defendants of a fair trial. Nor do they call for methods which are merely expedient and less time consuming and expensive.

It is submitted that the Court lay down ground rules relating to the receiving of evidence, the marshalling thereof, and in particular, the handling of instructions. Nothing is accomplished by limiting the proof throughout the trial to one defendant or another, and then giving an instruction which effectively destroys these admonitions. The courts must be instructed to carry this marshalling or limiting procedure to the very end of the trial, i.e., the instructions. The courts must instruct the jurors to the effect that out-of-court statements, actions, declarations and admissions must be limited to the persons involved. Then, in the event independent evidence which is applicable to all defendants establishes a scheme or conspiracy, then, and only in that event, can such out-of-court matters be considered. Furthermore, such consideration can be extended only to such statements, actions, declarations and omissions that are made in furtherance of a conspiracy or a scheme, or in the course thereof. Under such an instruction, much of the evidence in the case at bar would have been clearly inadmissible.

Lastly, the Court should make it clear that the trial courts must give more meaningful attention to the matter of separate trials. The abuse of discretion rule is unsatisfactory, unworkable and unfair, and, in the opinion of this writer, has resulted in grave injustice on far too many occasions. When a Motion for Separate Trial is filed, the court should at once make adequate inquiry, even if prior to trial, as to the evidence to be offered against the various defendants. If he denies the motion on the grounds that he does not have adequate information at that time, he should be alert throughout the trial to order a severance in the event the evidence develops as it did in *Haupt* and *Kelly,* and as it developed in the instant case. The severance should be granted unhesitatingly even though it may result in additional expense and loss of time.

The helplessness of a co-defendant when listening to days of testimony that does not concern him, observing hundreds of documents received in evidence which are strange to him, and having the court's admonitions concerning such documents diluted or destroyed in a few moments by an instruction to the jury, as here, is intolerable. The Court's intervention is needed, not only in this case, but in the cases which will arise in the future.

D. The Court of Appeals for the Tenth Circuit, in writing an opinion containing a number of material misstatements of fact, so far departed from the accepted and usual course of proceedings so as to warrant the invocation of the Court's powers of supervision.

This was a complicated case, thus it is readily understandable that the Court of Appeals would make an effort to epitomize the fact situation so as to save time and space. However, we cannot account for the paucity of facts set out in the Court's opinion. We submit that the court

was not fair to Lowry in its silence as to mitigating factors, the background relating to the formation of the various boards, its bare conclusions concerning the relationship between Lowry and Lowther, its unwarranted innuendoes, and its characterization of some of the events alleged to have transpired during the crucial period involved herein. We would list but a few:

1. The opinion states: "In 1965 he [Lowry] gained control of three dormant mining companies, Cresson Consolidated Gold Mining & Milling Company, United Gold Mines Company, and the Elkton Company." Not only is Golden Cycle ignored in the opinion, but also ignored was the pending foreclosure proceedings, the anxiety of investors and stockbrokers, prior attempts to salvage the satellite companies, the resignations of the various boards, all interlocking with Golden Cycle, and the rather high-handed attitude of the Golden Cycle firm, among other things.

2. The appellation "dummy boards" we submit, was unfair and connotes more than it should under the circumstances.

3. The Court said Mr. Lowry and Lowther "conferred constantly". This, it is urged, is an exaggerated and unfair statement. The evidence does not substantiate this statement. For instance, *the evidence did not establish a single conference between Mr. Lowry and Lowther after December 2, 1966, the day Lowther formed the permanent Elkton board.*

4. The court alludes to the Board of Directors never meeting, but that minutes were signed indicating meetings were held. This is the same line of attack followed by the Government, which led to Lowry's counsel objecting, with the result that he narrowly escaped being held in

contempt of court. This is a clear hint of illegality which the trial court did not comment upon until he gave his charge to the jury. Now, this court has again, by innuendo, indicated impropriety, although the record clearly establishes that the signing of minutes in such fashion, coupled with a signed consent, is perfectly proper under Colorado law. C.R.S. 31-4-22 (1963).

5. The court mentions Lowther and Lowry nominees. We fail to find anything in the record indicating that Lowry ever purchased Elkton stock through a nominee. He was always the principal, both in buying and selling, and so stated in each of his investment letters and his investment bulletins.

6. Jolkovsky: The court states that Mrs. Jolkovsky purchased 4,000 additional shares of Elkton on January 10, 1966. The Court also said that Mrs. Jolkovsky had made four stock purchases. What the Court neglected to point out was that this lady purchased the 4000 shares from Scanlon & Company and Sudler & Company in two purchases not from Lowry, and further, that Mrs. Jolkovsky purchased said stock from these companies after being advised of the great risk involved. She preferred to rely on her own judgment. This is clearly stated in the record.

The court also drew an erroneous conclusion that Mrs. Jolkovsky "encouraged by subsequent letters", bought more stock. Mrs. Jolkovsky refuted this by her own testimony (no reliance; own judgment).

7. There is no evidence that Lowry deliberately misrepresented the condition of Elkton. The realities of the stock market are completely ignored by the court. A stockbroker gets his information from management, newspapers, stockholders, letters, etc. If he distributes an investment letter, it is based on such information, and he

says so, as did Lowry. There is no evidence to the contrary here; the court does exactly what the Government did below—lumped Lowther and Lowry together at all times, with such statements as, "Lowry and Lowther represented to the public that it [Elkton] was doing well" (page 5). We submit that the record does not warrant this conclusion.

8. The use of the phrase "tremendous profits" is not warranted by the record, nor does it have a legal connotation. Lowry is condemned with finality by the use of such strong language.

9. On page 8 of its opinion, the court says that a January 22, 1966, investment letter said that Elkton stock looked "cheap" at 11 cents per share in view of the pending acquisitions. In fact, the letter says as follows: "Successful completion of any one or two of the larger acquisitions contemplated *could* make the current 11 cents market price look cheap." Such a change in language is detrimental and prejudicial besides being inaccurate.

10. The court states that the Colorado Springs Stock Exchange was actually in Lowry's office. This statement suggests a fly-by-night operation. Actually, the Colorado Springs Stock Exchange, as disclosed by the evidence, was the smallest stock exchange in the world, but had been in operation for over forty years.

11. The court states that in February Elkton was quoted at 10 cents per share in Lowry's investment letter. What investment letter? There was no investment letter in the month of February. There was an investment letter on January 22, 1966, and another one on March 19, 1966. Furthermore, the opinion makes reference to Solar Airlines, Hasty House Restaurant Chain, and Accounting Management Service. The court points out that the letter was very "misleading". What letter? It is

not clear from the letter whether the court was referring to a nonexistent investment letter, or to the March 3, 1966, Frank McCall Agency release, which does in fact refer to the three above companies. This is a material factual error which should have been corrected.

12. The court failed to state that the March 19, 1966, newsletter, which mentioned these acquisitions, clearly states that the press reported these acquisitions. Failure to mention such sources, places Lowry in a far more deleterious light than the statements set forth in the newsletter.

13. The April 18, 1966, newsletter is quoted as stating that "the stock might be overvalued and that the current income was extremely small". As a matter of fact, Lowry pointed out that the report on Elkton Company was negative, causing the current price level to appear possibly overvalued. He continued, "Elkton's current income while on report is believed to be extremely small, if in the black."

14. Issue is taken with the statement in the opinion that Lowry had agreed to let Lowther and El Paso run Elkton. As a matter of fact, Lowry wasn't even on the three-man board that approved the El Paso contract.

15. The lower court's opinion points out that in oral argument, defense attorneys brought out that Lowry and Lowther's names were confused 58 times during the trial. The opinion claims that their names were mixed up approximately 23 times. We have carefully gone over the record and have established that the confusion occurred 54 times. (See Appendix C.) Many of the mistakes were uncorrected; some of them were devastatingly prejudicial. These facts are brought to the attention of the Court of Appeals in the Petition for a Rehearing. However, the court refused to make even this obvious correction.

CONCLUSION

We contend that the evidence submitted by the Government, both documentary and testimonial, which could legally be admitted against Lowry, fell far short of the quantum justice requires, and that Lowry was convicted as a result of speculation, suspicion, and unwarranted surmises on the part of the jury, coupled with plain guilt by association. A severance should have been granted so as to assure that Lowry received a fair trial untainted by a large body of evidence inapplicable to him, but incriminating as to his Co-Defendants Lowther and Courts. As to Lowry, we submit an old Latin saying was unconsciously and without justification applied by the jury: *Consortio malorum mequoque malum fatit.* (The company of wicked men makes me also wicked.)

It is respectfully requested that the Court grant this Petition for the reason that the lower courts' decision is in conflict with decisions of this Court and other circuits; that the Court's rule-making power should be invoked with respect to trial procedures in conspiracy and scheme to defraud cases; and that the Court's powers of supervision should likewise be invoked to correct a factually defective opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM - 1972

HARRY ALLEN LOWTHER, JR., WENDEL EVERETT LOWRY and LOWRY INVESTMENTS, INC., a Colorado corporation, Defendants-Appellants, v. UNITED STATES OF AMERICA, Plaintiff-Appellee.	Nos. 71-1017 71-1018

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (64-CR-318)

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

The appellants were convicted by a jury of fraud in the sale of securities in violation of 15 U.S.C. § 77 q(a).[1]

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1. Section 17(a), Securities Act of 1933, 15 U.S.C. § 77 q(a) provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly, or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Harry A. Lowther, Jr. was sentenced to 5 years imprisonment under 18 U.S.C. § 4208 (b) and Wendell E. Lowry was sentenced to 4 months, followed by 20 months probation. Lowry Investments, Inc. was fined $1,000. Carl E. Courts was found not guilty on all counts. Counts one through six involved 15 U.S.C. § 77 q(a), fraud in the sale of securities, and Count seven, 18 U.S.C. § 371, involved conspiracy against the United States. Prior to trial Count seven was dismissed. Count four was dismissed after the Government had presented its case. Lowther was acquitted on Counts three and five, and Lowry and Lowry Investments were acquitted on Counts two and six. The jury did not reach a verdict on Counts two and six as to Lowther or on Counts three and five as to Lowry and Lowry Investments.[2] Lowry, Lowther and Lowry Investments were convicted on Count one involving use of the mails by the appellants on or about December 15, 1965 to send a confirmation of sale to Mrs. Betty Jolkovsky of 2,500 shares of shares of Elkton stock to employ a scheme to defraud, obtain money by means of untrue statements of material facts or to operate a fraud upon purchasers. Lowry and Lowry Investments, Inc. will be referred to as Lowry.

Lowry owned Lowry Investment, Inc. in Colorado Springs, Colorado, and specialized in penny stocks. In 1965 he gained control of three dormant mining companies,

2. *Count two* involved use of the mails by the appellants on or about December 8, 1965 to send Roy Dickson a letter bearing the name of the Elkton Company; *Count three* involved use of the mails on or about December 17, 1965 to send Emil Endres a stock certificate for 2,500 shares of Elkton stock; *Count five* involved use of the mails on or about December 7, 1965 to send Howard Kuhnle a confirmation of sale of 5,000 shares of Elkton; *Count six* involved use of the mails on or about March 15, 1966 to send a stock certificate for 50,000 shares of Elkton stock to Claudius Fingar. *Count four* involved use of the mails on or about December 8, 1965 to send Homer Rogers a confirmation of sale of 2,500 shares of Elkton stock and *Count seven* involved conspiracy to commit offenses against the United States.

Cresson Consolidated Gold Mining and Milling Company, United Gold Mines Company, and The Elkton Company. A board of directors was formed including Lowry, but they never met; minutes were signed, however, indicating that meetings were held. Lowry kept the records of the companies. These three corporations had interlocking boards of directors. In late 1965 the Elkton Company retained El Paso Financial Corporation to serve as its financial manager; it was controlled by Lowther. The offices of Lowry and Lowther were in the same building and they conferred constantly. Resolutions were passed authorizing the sale of 1,480,233 shares of Elkton at 1/10 of a cent per share. The shares were purchased by Lowry, Lowther and their nominees. In November of 1965 Lowry made a tender offer to other Elkton shareholders to buy Elkton stock at ¼ of a cent per share net. Lowry obtained 230,000 shares in response to the offer. Lowry resigned from the board of directors of Elkton on November 9, 1965. On December 2, 1965 the remainder of Lowry's directors in Elkton resigned.

As manager of Elkton, Lowther began negotiations to purchase two companies in unrelated fields, Chemspray Corporation and Rocky Mountain Rent-A-Car Corporation. Although Elkton was unsuccessful in its dealings, Lowry and Lowther represented to the public that it was doing well. On December 4, 1965 Lowry issued one of his periodic Lowry Investment, Inc. letters to his customers in which he stated that Elkton "could prove to be the speculation of the year for 1966." Lowry offered the stock in this letter at 2 cents per share, double the price quoted in his investment letter two weeks before. The investment letter stated that Elkton was being managed by El Paso; that it had purchased 51% of Chemspray, and projected a substantial cash flow income from this ac-

quisition; that Elkton expected to purchase Econ-O-Car Rentals, which Lowry described as "Chrysler's new entry into the national car rental business"; that a third "*major*" acquisition was contemplated; and that El Paso's goal for Elkton was an income of $100,000 per year.

On December 8, 1965, Lowther issued a letter to Elkton shareholders in which he told of El Paso's intention to convert Elkton into a holding company and to acquire profitable subsidiaries. Lowther listed the members of the new board of directors and their credentials. In several instances the credentials attributed to the members of the board were either inaccurate or misleading. The letter also announced the purchase of Chemspray, and described it as a "leading manufacturer of industrial cleaning equipment and chemicals", with "remarkable growth in sales and profits during the year 1965." Lowther projected gross sales for Chemspray in 1966 at $1,750,000 and profits of $250,000. Its assets were stated to be $166,377, its liabilities $12,580, and stockholders' equity $153,797. In reality Chemspray had no earnings in 1965, it had little cash and there was no basis for projecting earnings of any substantial amount in 1966.

During December of 1965 Elkton Corporation hired a public relations firm to issue press releases. It was to be paid in shares of Elkton borrowed from Lowther. The information issued was obtained from the Chairman of the Board of Directors, Hamilton Gregg II, and from Lowther. One of the news releases contained information about Chemspray which had been related in the stockholders' letter.

On December 9, 1965 the public relations firm issued a press release concerning Elkton's purchase of Rocky Mountain Rent-A-Car Corporation. Gregg and Lowther supplied the information for the release. The release

stated that Rocky Mountain had 197 rental units and that its estimated earnings for 1966 were $310,000. In reality Rocky Mountain was in debt and retained only some 12 rental units.

On December 31, 1965 Lowry issued an investment letter in which Elkton was quoted at 8 cents per share. The letter related Elkton's purchase of 25% of Chemspray with an option to purchase an additional 26%, as well as the purchase of "several" car rental companies. It also stated that Elkton hoped to make a "major acquisition of an established business" within the month.

In January of 1966 Elkton reached 11 cents per share. Lowry's investment letter of January 22, 1966 stated that Elkton had paid $4,000 to redeem the Jerry Johnson gold mine. The letter also stated that Elkton looked "cheap" at 11 cents per share in view of the pending acquisitions. On January 27, 1966 a stockholders' letter was issued by Lowther in which the Jerry Johnson lease was reported along with the acquisitions of Chemspray and Rocky Mountain. It also represented that Elkton was listed on the Colorado Springs Stock Exchange; that Arthur Anderson and Company were employed as auditors; that an annual report would be issued in 1966; and that the company records would be transferred to computers by Elkton-controlled Accounting Systems Management, Inc., "a specialist in computer bookeeping serving clients in Colorado." In truth the Colorado Springs Stock Exchange was Lowry's office; Arthur Anderson and Company declined to serve as Elkton's auditors; and Accounting Systems Management had only recently been established, consisted of two partners, and had no history of earnings.

In February Elkton was quoted at 10 cents per share in Lowry's investment letter. In March a news release

announced Elkton had made three acquisitions, Solar Airlines, Hasty House Restaurant chain and Accounting Management Service. Solar Airlines was described as a regional carrier from Mexico to Albuquerque, New Mexico and Dallas, Texas using radar-equipped turbo-jets. Hasty House was described as a franchise with units from Kansas City to the West Coast and Accounting Management Service was described as being able to provide computerized bookkeeping service to all Elkton subsidiaries. The letter was very misleading. It again gave false credentials to members of the board of directors; it stated that one man was on the board when he did not serve; Hasty House was not purchased and it was hopelessly in debt; and Lowther purchased Solar Airlines on a $1 option. Solar Airlines in fact had only five airplanes of which four were not in use. Also Solar Airlines was in debt and the directors did not authorize its purchase.

On March 19, 1966 Lowry published another investment letter in which he repeated these acquisitions. On April 18, 1966 Lowry's letter quoted Elkton at 15 cents per share but noted that trading in the stock had been suspended by the S.E.C. as of 4:30 p.m. on that date because of suspected misrepresentations. It stated that the stock might be overvalued and that the current income was extremely small. As a result of these activities Lowry and Lowther created an artificial market for Elkton stock; the price rose from ¼ of a cent on December 2, 1965 to a high of 20 cents on April 14, 1966.

Prior to the S.E.C. suspension, Lowther and Lowry sold almost all of their Elkton stock acquired from Cresson and United. They had purchased their shares at 1/10 and 1/4 of a cent per share and sold them at prices ranging from 2½ to 11 cents per share. Lowther and Lowry made tremendous profits.

In the interim private investors purchased Elkton stock. Mrs. Jolkovsky of Atlanta, Georgia, received the December 4, 1965 Lowry investment letter which described Elkton as the potential speculation of the year. She wrote to Lowry about the stock and sent a check for $120 to buy 6,000 shares at 2 cents per share. The order was not filled at that time because the price had risen to 4½ cents per share. On December 15, 1965 she purchased 2,500 shares of Elkton from Lowry at 4½ cents. Encouraged by subsequent letters from Lowry she purchased an additional 4,000 shares at 7¾ cents and 3,000 shares at 8 cents on January 10, 1966. She did not receive any information that Elkton's subsidiaries were failing companies or that Lowry and Lowther had personally purchased large amounts of Elkton at 1/10 of a cent per share and had made large profits in selling the stock. In April of 1966 she purchased 4,000 shares at 9 cents from Lowry Investments. She owned all the shares at the time of the trial.

Lowry and Lowther contend on appeal that: (1) the trial court erred in denying their individual motions for acquittal; (2) the trial court erred in denying their individually raised motions for a new trial; (3) the trial court erred in not granting separate trials; (4) the trial court erred in failing to marshal the evidence and in instructing the jury with respect thereto; (5) the trial court erred in admitting certain exhibits; (6) the verdict is not supported by substantial evidence; and (7) the trial court erred in denying their individually raised motions for a mistrial. In addition Lowther contends individually that: (1) the trial court erred in failing to ask certain tendered voir dire questions; (2) the trial court erred in denying his motion for a directed verdict; and (3) the trial court erred in denying in toto his motion to strike and in allowing the indictment to go to the jury containing unproven allegations.

I.

Lowther and Lowry allege that under Fed.R.Crim.P., Rule 29, their motions for acquittal at the close of the Government's case should have been granted. They allege that the Government failed to produce sufficient evidence to sustain their convictions on the scheme charge. Fed. R.Crim.P., Rule 29, provides for an acquittal upon motion of the defendant after the evidence on either side is closed if the evidence is insufficient to sustain a conviction.

> "In deciding a motion for acquittal the trial judge determines whether, considering the evidence in the light most favorable to the government, there is substantial evidence from which a jury might reasonably find that an accused is guilty beyond a reasonable doubt." United States v. Harris, 441 F.2d 1333 (10th Cir. 1971) at 1336-1337.

Our review of the record at the close of the Government's case in chief disclosed that the evidence presented by the Government amply demonstrated the existence of a common scheme to defraud with respect to Lowry and Lowther.

Lowry started with a shell corporation, the Elkton Company, which had very little assets. He obtained control of Cresson and United Gold which held substantial blocks of Elkton stock and obtained their Elkton stock by the use of dummy boards and board minutes prepared in advance. Lowry, Lowther and their nominees purchased the outstanding stock for 1/10 of a cent per share and Lowry purchased an additional 240,000 shares for ¼ of a cent per share from stock received in response to a tender offer to Elkton shareholders.

Lowry and Lowther made an agreement to give El Paso absolute control of Elkton, and Lowry Investments was used as a conduit through which information about Elkton flowed. Mr. Courts worked for Lowther. He drew up documents; was in charge of transfers; took money from Cresson and United Gold and put it into El Paso; and made it possible for Lowry and Lowther to split 1,500,000 shares of Elkton. Shareholder letters, market letters and press releases revealed an improved and encouraging outlook for Elkton stock, based upon a series of alleged acquisitions by Elkton of other enterprises. Investors were not told of the real condition of these companies. These public misrepresentations enabled the Elkton stock to reach artificially high levels at which time Lowry and Lowther sold their shares at inflated prices. Lowther profited by about $66,000 and Lowry's profit amounted to about $68,000. Mrs. Jolkovsky purchased shares of Elkton because of the representations made in the letters which she received. She was a victim of Lowry's and Lowther's scheme to defraud. Thus on the basis of the record we conclude that the trial judge committed no error in the application of Rule 29.

II.

Lowry argues that his motion for acquittal should have been granted by the court because the guilty verdict on Count one involved identical evidence which the jury found insufficient on Counts two, three, five and six involving transactions occurring before and after the transaction in Count one. Lowther also alleges that a new trial should have been granted because of the inconsistent verdicts wherein the jury found the appellants guilty under Count one and not guilty on counts which involved identical evidence. They argue that there could be no scheme to

defraud because Lowther's acquittal on Counts three and five shows that the jury determined that there was no scheme between Lowther and Lowry in early December of 1965. Thus, they contend, if there was no scheme as to Kuhnle and Endres there could be no scheme against Mrs. Jolkovsky. We disagree. Each count in an indictment is a separate offense and consistency in the verdict is not necessary. Dunn v. United States, 284 U.S. 390 (1932); Speers v. United States, 387 F.2d 698 (10th Cir. 1967), cert. denied 391 U.S. 956 (1968); Maxfield v. United States, 360 F.2d 97 (10th Cir. 1966), cert. denied 385 U.S. 830 (1966); Burns v. United States, 286 F.2d 152 (10th Cir. 1961). Furthermore the Jolkovsky transactions involved four purchases over a period of time.

III.

Lowther and Lowry allege that a severance should have been granted because evidence and testimony during the trial admissible as to one defendant was not always admissible as to the other defendants and because insufficient cautionary instructions were given by the trial judge. Rule 14, Fed.R.Crim.P. requires that if a defendant is prejudiced by a joinder the court may order separate trials. In oral argument the appellants' attorneys brought out that Lowry and Lowther's names were confused 58 times during the trial. From our examination of the record we found that their names were mixed up approximately 23 times. In almost every instance the confusion was immediately noted and clarified by the Court. The motion to sever was properly denied by the trial court.

Lowry and Lowther were shown to be participants in a scheme to defraud purchasers of Elkton stock. The Court carefully protected each appellant by instructions limiting the jury from considering evidence against any

defendant not shown to have been tied thereto. The trial judge stated during his closing instructions:

> "The acts, omissions, declarations, or statements of any one defendant are not to be considered by you as the acts, omissions, declarations, or statements of any other defendant, unless and until you are satisfied beyond a reasonable doubt that such defendant has entered into the unlawful scheme to defraud, as alleged in the Indictment, and that he was an active, knowing, and willful participate (sic) in such scheme at the time that the act, omission, declaration, or statement was made, and that the act, omission, declaration, or statement was made to bring about the criminal objective of the scheme."

This court has held that it is within the discretion of the trial court to grant separate trials and unless a clear abuse of discretion is shown, his ruling will be upheld on appeal. United States v. Kellerman, 432 F.2d 371 (10th Cir. 1970); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), cert. denied 394 U.S. 908 (1969); Baker v. United States, 329 F.2d 786 (10th Cir. 1964), cert. denied 379 U.S. 853 (1964). A severance may be granted only where the defendant has shown that he would clearly be prejudiced by a joint trial. There was substantial evidence that Lowry and Lowther participated in the same scheme to defraud justifying a joint trial under Rule 8, Fed.R.Crim.P. The appellants have failed to show sufficient prejudice to warrant a severance. The trial court did not abuse its discretion by not granting separate trials.

IV.

Both Lowry and Lowther contend that the trial court failed to marshal the evidence in such a way as to inform the jury of the proof against each defendant. They allege that the Court's instructions allowed the jury to consider evidence against all defendants when it should have been excluded as to one or more of them.

The Court gave the following instructions during his closing remarks to the jury:

> "Each offense, and the evidence applicable thereto, should be considered by you separately as to each defendant, and as to each Count.
>
> The fact that you may find a defendant guilty or not guilty as to one Count, should not control your verdict with respect to the guilt or innocence of that defendant, of the other Counts. The guilt or innocence of any one defendant of any Count should not influence your verdict respecting the other defendants.
>
> Each defendant is entitled to have the Charges against him considered separately in the determination of his guilt or innocence, as to any or all of the offenses charged against him.
>
> You will recall that during the course of the trial the Court instructed you as the evidence came before the Court and the jury that certain of that evidence could be considered by you only as to a certain defendant or defendants unless and until the Court instructed you to the contrary. The Court now instructs you as follows:
>
> The acts, omissions, declarations or statements of any one defendant are not to be considered by you as the acts, omissions, declarations, or statements of any other

defendant unless and until you are satisfied beyond a reasonable doubt that such defendant has entered into the unlawful scheme to defraud, as alleged in the Indictment and that he was active, knowing, and a willful participant in such scheme at the time that the act, omission, declaration or statement was made, and that the act, omissions, declaration or statement was made to bring about the criminal objective of the scheme.

If you find from the evidence beyond a reasonable doubt that a defendant entered into the alleged unlawful scheme with one or more of the other defendants and knowingly and willfully participated therein with another defendant or defendants for the purpose of bringing about the criminal objective of such scheme, then in that event you may consider as to those participating defendants all of the acts, omissions, declarations or statements made by any and all of such participants in the unlawful scheme."

The instructions were proper. They restricted the use of evidence against all of the defendants from consideration until a scheme was found to exist beyond a reasonable doubt. It is within the trial court's discretion to state the facts in his closing charge and to comment on the evidence. Starr v. United States, 153 U.S. 614 (1894); Quercia v. United States, 289 U.S. 466 (1933); United States v. Tourine, 428 F.2d 865 (2nd Cir. 1970), cert. denied 400 U.S. 1020 (1971). There was no abuse of discretion here when the Court decided not to comment on the evidence as it pertained to each defendant. There was a lengthy trial. It involved a great deal of evidence. The jury's individualized verdicts demonstrated that it had no difficulty following the Court's instructions on an individualized

basis as to each defendant. The Court was careful to adequately safeguard each defendant against the possibility that evidence applicable to one defendant would be used to convict another defendant.

The appellants also contend that certain requested instructions were not given by the Court although no objections were made during the trial. It is a general rule that appellate courts will not consider instructions to which no objections or exceptions were made, except that the court has the inherent power to inquire into the adequacy of a charge in cases where there is grave error which amounts to a denial of a fundamental right of the accused. Fischer v. United States, 212 F.2d 441 (10th Cir. 1954); Madsen v. United States, 165 F.2d 507 (10th Cir. 1947). No such fundamental right was denied here. The Court adequately covered the requested instructions during the trial and by the instructions given in his closing remarks. Troutman v. United States, 100 F.2d 628 (10th Cir. 1938); Tingley v. United States, 34 F.2d 1 (10th Cir. 1929); Luke v. United States, 84 F.2d 823 (5th Cir. 1936). The purpose for which evidence is admitted may be limited either at the time it is received or in the general instructions. Troutman v. United States, *supra*. Since the Court properly marshalled the evidence at the time it was received there was no need to limit it through a general instruction at the end of the trial.

V.

Lowry and Lowther allege that certain exhibits should not have been admitted into evidence because they only pertained to one of the defendants and they were hearsay as to the other. There is no need to discuss the admissibility of certain exhibits in detail because the Court correctly handled the admission of exhibits which applied

to less than all of the appellants by instructing the jury that they were to be considered only as to the particular defendant connected with it. Beckwith v. United States, 367 F.2d 458 (10th Cir. 1966). At the conclusion of the trial the Court properly instructed the jury that if a common scheme was found to exist, evidence against one appellant could be considered against the others. The general rule is that where two or more people have schemed to commit a criminal offense, everything done or said by one of them during the scheme may be admitted in evidence against the others. Beckwith v. United States, *supra;* Glover v. United States, 306 F.2d 594 (10th Cir. 1962); Beck v. United States, 305 F.2d 595 (10th Cir. 1962), cert. denied 371 U.S. 890 (1962). The Court did not abuse its discretion by admitting the exhibits.

VI.

Lowther moved twice during the trial for a mistrial. He sought a mistrial after the testimony of a Government witness disclosed that short checks had been presented by him. Lowther alleges that evidence must tend to prove a matter in issue and cites Bowman v. United States, 267 F. 648 (D.C. Cir. 1920). He also cites Melton v. United States, 398 F.2d 321 (10th Cir. 1968) for the proposition that evidence of unrelated offenses is inadmissible. Although *Melton* and *Bowman* are properly cited by Lowther, his contention has no merit. The evidence introduced would not have aroused the suspicion of other criminal conduct by Lowther in the minds of the jury.

Lowther and Lowry each moved for a mistrial on the basis of an exchange between Lowry's counsel and the Court concerning the signing of minutes. Lowry's attorney told the Court in the presence of the jury that it is a well established practice that directors sign minutes; the

Court interrupted and stated that it did not ask for "contemptuous conduct" by counsel. The appellants contend that this amounted to prejudicial conduct on the part of the Court and prevented them from obtaining a fair trial. However, the trial court acted properly in ordering counsel not to comment on what was not then in evidence. The Court has the power to direct the trial along recognized lines of procedure in a manner reasonably thought to bring about a just result. Non-prejudicial comments may be made by the Court from time to time. Cooper v. United States, 403 F.2d 71 (10th Cir. 1968); Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951); Posey v. United States, 416 F.2d 545 (5th Cir. 1969), cert. denied 397 U.S. 946 (1970).

In Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970) counsel was threatened with contempt by the Court during the trial and the appellant contended that this denied him a fair trial. The Court held that although counsel was caused some disappointment and perhaps discomfort, this could not be said to have interfered with the fairness of the trial. That would appear to be the situation here. Counsel argued with the Court about a point and the Court ordered him not to discuss it any further at that time. Although Lowry's counsel was perhaps embarrassed in the presence of the jury this cannot be said to amount to such prejudice as to have resulted in an unfair trial.

VII.

Lowther alleges that thirteen proposed voir dire questions were not asked the jury and that all of them pertained to the state of mind of the jurors which would result in prejudice to one or more defendants. He alleges that the Court's discretion in asking questions should be subject to essential demands of fairness. This court recog-

nizes that the trial court has broad discretion on questions to be asked on voir dire. Aldridge v. United States, 283 U.S. 308 (1931); United States v. Brewer, 427 F.2d 409 (10th Cir. 1970); United States v. Williams, 417 F.2d 630 (10th Cir. 1969); Kreuter v. United States, 376 F.2d 654 (10th Cir. 1967), cert. denied 390 U.S. 1015 (1968). The trial court's discretion will not be disturbed on appeal unless voir dire was inadequate to test the qualifications and competency of the jurors. Kreuter v. United States, *supra;* Brundage v. United States, 365 F.2d 616 (10th Cir. 1966); Speak v. United States, 161 F.2d 562 (10th Cir. 1947). After a thorough examination of the record we are convinced that there was no abuse of discretion by the trial court in not asking the proffered voir dire questions.

VIII.

Lowther argues that certain portions of the Indictment should have been stricken because they had no testimonial relation to the case and that it was error to send the Indictments to the jury room. The failure to strike certain portions of the Indictment was not prejudicial because of the Court's instructions that the Indictment was not evidence; that guilt or innocence was to be determined on the evidence; that the Government was not required to prove each aspect of the Indictment; and that a conviction could not be upheld on suspicion or conjecture. United States v. Warner, 428 F.2d 730 (8th Cir. 1970), cert. denied 400 U.S. 930 (1970); United States v. Marquez, 424 F.2d 236 (2nd Cir. 1970), cert. denied 400 U.S. 828 (1970); United States v. Rice, 428 F.2d 923 (5th Cir. 1970).

We have studied this voluminous record with care. We find that the trial court conducted a difficult case with extreme care in order to protect all of the rights of those accused. There is substantial evidence to support the jury's conclusion of guilt on Count one.

WE AFFIRM.

MARCH TERM—APRIL 13, 1972

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable James E. Barrett, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WENDEL EVERETT LOWRY and LOWRY INVESTMENTS, INC.,
Defendants-Appellants.
No. 71-1018

Upon consideration of petition for rehearing filed by appellants, Wendel Everett Lowry and Lowry Investments, Inc., it is ordered that said petition be and is denied.

APPENDIX B

	EXHIBIT NO. (GOVT.)
Elkton stockholders letter of 12/8/65	1-I
Scanlan confirmation of 1/10/66 for 4000/s Elkton at 7-3/4¢	1-N
Sudler confirmation of 1/10/66 for 3000/s Elkton at 8¢	1-R
Elkton stockholder newsletter of 1/27/66 with envelope	1-X
Telegram of 2/3/66	1-Ya
Denver Post news article of 3/13/66	1-KK
Denver Post news article of 12/13/65	1-LL
Fingar check for $4500 dated 3/10/66 to H. Lowther	6-A
Fingar note for $3500 dated 3/10/66 to Lowther	6-B
Contract between El Paso Financial Company and Courts	13
Solar-El Paso contract February 16, 1966	16
Memo Courts to Hill and Lowther, March 28, 1966	16-A
Minutes of 3/3/66 Solar meeting	16-B
Letter from Econocar to Rocky Mountain Rent-a-Car	17
Newspaper articles in December (Gazette-Telegraph)	17-A
Check 12/2/65, Hill to El Paso	18-A
Check, Hill to Lowther, $1012.50 dated 2/2/66	18-B
Elkton stock certificate for 21,600 shares, cert. No. 4998, to Hill	18-C
Letter Lowther to Hill 2/7/66	18-D
Summary of transfer of Elkton stock from Cresson and U.G.M.	39

Summary of transfer and sale of Elkton stock issued to Marilyn Lowry, Cert. #4316	39-A
Summary of transfer and sale of Elkton stock issued to John Colbrunn, Cert. #4315	39-B
Minutes of Board of Directors Meeting of Dec. 8, 1965 of Elkton	66-G
Unsigned copy of Dec. 30, 1965 minutes	66-H
Signed copy of Dec. 30, 1965 Minutes	66-I
Affidavit of 2/25/66 signed by Murchison	66-L
Minutes of Board of Directors meeting of 2/26/66	66-P
Agreement and assignment 4/16/66 Danielson and Prato	70-A
Check for $10,000 Prato to Danielson	71
Cashier's checks of Central Bank	72-81
Courts letter to Lowther of 12/1/65	88
Elkton letter of Dec. 8, 1965 (same as 1-I)	98
Elkton call for shareholders meeting and Elkton stockholder newsletter of 1/27/66 (same as 1-X)	99
List of news releases	100
Release Dec. 8, 1965	101
Release Dec. 9, 1965	102
Release Feb. 14, 1966	103
Release Mar. 3, 1966	104
Letter of Mar. 10, 1966	105
Colo. Springs Gazette-Telegraph article of 12/7/65	110
Colo. Springs Gazette-Telegraph article of 12/16/65	110-A
Colo. Springs Free Press article of 3/10/66	112-A
Check of 2/18/66 B. J. Leonard to Lowther	116
Check of 2/11/66 Ohlson to Lowther for $2500	117

Check of 3/9/66 Ohlson to Lowther for $450	117-A
Check of 4/1/66 Ohlson to Lowther for $250	117-B
Check of 4/14/66 Ohlson to Lowther for $300	117-C
Check of 4/14/66 Ohlson to Lowther for $500	117-D
Check of Empire Insurance of 5/5/66 for $1000	119-A
Check of Empire Insurance of 5/9/66 for $750	119-B
Boettcher confirmation	119-C
Note Henson to El Paso Financial of 3/31/66	120
McDonnell confirmations	120-A
Boettcher $650 check	120-B
Receipt from Boettcher to Henson	120-C
3rd party release form signed 3/31/66	120-D
Confirmation of 12/31/65 of 100,000 shares to Jumarde Trust	121
Check #26809 Sudler & Co. to Jumarde Trust for $4998 on 1/5/66	121-A
Securities receipt copy of Sudler confirmation of 100,000 shares to Jumarde Trust on 1/12/66	121-B
Original check of Sudler for $6000 to Jumarde Trust 1/12/66	121-C
Transfer instruction 100,000 shares, cert. #4382 addressed to El Paso Financial	121-D
Transfer instruction 100,000 shares, cert. #4383 for Jumarde stock 1/29/66	121-E
Letter of Lowther to Sudler & Co.	124
Note 12/14/65 Lowther to Roberson	125
Letter of Lowther to Roberson	125-A
Boettcher & Co. receipt for 90,000 shares of Elkton of 1/14/66	125-B
Boettcher confirmation of sale of 50,000 Elkton shares, 1/19/66	125-C

Check for $3550 Boettcher to Pikes Peak Bank, 1/25/66	125-D
Deposit slip 1/27/66	125-E
Note of 1/31/66 for $4000 to Cripple Creek	126
Elkton stock for 250,000 shares	126-A
Affidavit of Carl Courts of 2/1/66	126-C
Deposit slip for $4000	126-D
Check of 1/31/66 1st National of Cripple Creek to Lowther for $2000	126-E
Letter Lowther to Jones of 2/28/66	126-G
Letter Courts to Colbrunn dated 12/1/65	129
Letter of R. C. Bennett to Lowther 4/19/66	132
Elkton Articles of Incorporation	140
Rocky Mt. Rent-A-Car Articles of Incorporation	141
Chemspray Articles of Incorporation	142
Solar Articles of Incorporation	144
Signature Card El Paso	152] 152-A]
Deposit Slip to El Paso 1/17/66	152-B
Deposit Slip to El Paso 1/19/66	152-C
Courts' Letter 6/16/66	161
Courts' Letter to Chemspray 12/1/65	162
SEC Letter to Gottman 3/15/66	163
Lowther before the SEC 4/21/66	165

APPENDIX C

ERRORS IN NAMES

Transcript	Errors
Page 42, lines 4-5	Lowry for Lowther.
49, line 9	Lowry for a Mr. Laura—not corrected.
80, last line	Lowther for Lowry—corrected.
136, line 16	Court says Lowry for Lowther—not corrected.
195, line 8	Lowry for Lowther—corrected.
328, line 2	Lowther for Lowry—corrected.
345, line 1	Lowry for Lowther—not corrected.
378, line 18	Lowry for Lowther—not corrected.
575, lines 2-9	The District Attorney was confused, as was the Court—not corrected.
588, line 5	Lowther for Lowry—not corrected. This is a serious error since Lowry and Gutman had never met and did not know each other. Not corrected.
664, line 3	Lowry instead of Lowther—corrected.
665, last line	Lowry for Lowther. This is a serious mistake since it was undisputed that Lowry had nothing to do with the hiring of Mr. McCall. Not Corrected.
674, line 8	Lowry for Lowther. This was a serious error since this concerned purchase of a business. Lowry was not involved in any way. Not corrected.

676, line 5	Lowry for Lowther. A confusion came about which was never corrected. Lowther was not proved to have ever seen this witness.
685, line 25	Lowry for Lowther—partially corrected.
686, line 10	Lowry for Lowther. Not quite corrected.
695, line 25	Lowry for Lowther—corrected.
964, line 14	Lowther for Lowry—corrected.
972, line 22	Lowther for Lowry—corrected.
974, line 24	Lowther for Lowry—corrected.
988, line 11	Lowther for Lowry—not corrected.
997, line 24	Lowry for Lowther—not corrected.
1058	Lowther for Lowry—an important error—not corrected.
1083, lines 2-3	Lowry for Lowther—corrected.
1139, line 22	Lowry for Lowther—not corrected.
1141, line 5	Lowry for Lowther—not corrected.
1200, line 16	Lowry for Lowther—corrected.
1274, line 2	Lowry for Lowther—corrected.
1315, lines 5-11	Some confusion—corrected.
1404, line 11	Lowther for Lowry—corrected.
1405, line 8	Lowther for Lowry—corrected.
1445, line 25	Lowry for Lowther—corrected.
1508, line 17	Lowry for Lowther—a grievous error since Mr. Fingar was questioned concerning whether or not he felt Lowry dealt unfairly with him. Lowry had never dealt with Mr. Fingar. Not corrected.
1540, line 15	Lowther for Lowry—not corrected.

1545, line 3	Lowry for Lowther—a serious error concerning the advertising agency —not corrected.
1611, line 16	Lowry Investment Company for Lowther—not corrected.
1618, line 4	Lowry for Lowther—a serious error —not corrected.
1699, line 21	Lowry for Lowther—a serious error in argument by the District Attorney—not corrected.
1700, line 17	Lowry for Lowther—a serious error —not corrected.
1899, line 4-9	Lowry for Lowther. This is an extremely prejudicial error since Mr. Gotmann testifies he received certain cash from Mr. Lowry, when in fact it was Mr. Lowther—not corrected.
2109, line 25	Lowry for Lowther—not corrected.
2114, lines 19-20	Lowry for Lowther—corrected.
2200, line 11	Lowther for Lowry—corrected.
2240, line 25	Lowry for Lowther—corrected.
2347, line 11	Lowry for Lowther—a serious error in argument by the District Attorney—not corrected.
2352, line 1	Lowry for Lowther—a serious error by the District Attorney—not corrected.
2353, line 9	Lowry for Lowther—again a serious error by the District Attorney in argument—not corrected.
2356, line 11	Lowther for Lowry—not corrected.

2364, line 20	Lowther for Lowry—corrected.
2437, line 6	Lowther for Lowry—not corrected.
2465, line 20	Lowther for Lowry—corrected.
2467, line 13	Lowther for Lowry—corrected.
2469, line 8	Lowry for Lowther—not corrected.
2469, line 13	Lowry for Lowther—not corrected.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1614

WENDEL EVERETT LOWRY AND
LOWRY INVESTMENTS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the District of Colorado, petitioners and co-defendant Lowther[1] were convicted of fraud in the sale of securities, in violation of 15 U.S.C. 77q(a). Petitioner Wendell E. Lowry was sentenced to four months' imprisonment, followed by twenty months' probation. Petitioner Lowry Investments, Inc. was fined $1,000. The court of appeals affirmed in a comprehensive opinion (Pet. App. A1-A18).

[1] Lowther has filed a separate petition for a writ of certiorari to which we have filed a separate response (No. 71-6569, this Term).

The relevant evidence is set out in the opinion of the court of appeals. In brief, it showed that petitioner Lowry, owner of petitioner Lowry Investments, Inc. of Colorado Springs, Colorado, gained control of three dormant mining companies, one of which was the Elkton Company. Lowry maintained personal control of the companies. In 1965 Lowry retained a company, which was controlled by codefendant Lowther, as his "financial manager." Thereafter, Elkton authorized the sale of a million and a half shares of its common stock at one-tenth of a cent per share. The shares were purchased by petitioner Lowry, codefendant Lowther and their nominees. As a result of various manipulations detailed in the opinion below, including the making of numerous false representations in investment letters and press releases at the direction of petitioner Lowry and Lowther, the market price of Elkton stock rose substantially. Petitioner Lowry and codefendant Lowther then sold their stock in Elkton at artificially inflated prices.

Count I of the indictment, the only count on which petitioners were convicted, involved the sale of Elkton stock to a Mrs. Betty Jolkovsky of Atlanta, Georgia. In December 1965, she received a Lowry newsletter which described Elkton as the potential speculation of the year. She wrote to Lowry, requesting additional information about Elkton, and enclosed a check for $120 to purchase 6,000 shares at the listed price of two cents (Tr. 385–386; Exh. 1–B).[2] She received a reply

[2] "Tr." refers to the transcript in No. 71–6569 (Lowther) which is on file with the Clerk.

dated December 11, indicating that the order could not be filled because the price had advanced to 4½ cents (Tr. 390; Exh. 1–D). In a letter which she wrote to Lowry on December 15, Mrs. Jolkovsky agreed to purchase from Lowry 2,500 shares of Elkton at the 4½ cents price, and requested him to apply the balance of the $120 ($7.50) to future orders. She also placed an order for 10,000 shares at four cents (Exh. 1–G, 1–H). Thereafter, she received an Elkton stockholders' letter prepared on the basis of false and misleading information supplied by Lowther (Pet. App. A 6), listing the credentials of the new directors and announcing ties with other companies. She also received a Lowry investment letter for December 31, 1965 (Exh. 1–I, 1–K). Encouraged by the positive information contained in these reports, Mrs. Jolkovsky made additional purchases of Elkton stock from other investment companies—4,000 shares at 7¾ cents and 3,000 shares at 8 cents on January 10, 1966 (Exh. 1–N, 1–R). One of these companies sent her copies of newspaper articles which carried an announcement of Elkton's acquisitions based on a press release for which Lowther had supplied false and misleading information (Tr. 411; Pet. App. A 7). She did not receive any indication that the Elkton subsidiaries were failing companies, or that Lowry and Lowther had personally acquired large amounts of Elkton stock at less than one cent per share, and had made enormous profits in selling the stock (Tr. 480–482). In April, she purchased 4,000 more shares at 9 cents from petitioner Lowry Investments (Exh. 1–DD). At the time of trial,

Mrs. Jolkovsky still owned the Elkton shares (Tr. 527; Pet. App. A. 7).

Petitioners' principal contentions here—including an alleged improper denial of a severance—relate to claims of prejudice from the receipt of evidence inculpating co-defendants in their joint trial with petitioners. The court of appeals properly concluded that since "Lowry and Lowther were shown to be participants in a scheme to defraud purchasers of Elkton stock" and each was protected by an instruction admonishing the jury not to consider evidence against a defendant if he was not tied thereto, the district court did not abuse its discretion in denying a motion for severance (Pet. App. A 10). Moreover, the district court gave proper instructions (to which no objection was made) regarding the use the jury could make of a codefendant's statements or acts in furtherance of the scheme (Pet. App. A 11–13). Similarly the district court properly handled the documentary evidence initially received against codefendants only, as the court below found (see Pet. App. A 14–15).

The alleged factual errors in the opinion of the court of appeals—brought to that court's attention in a petition for rehearing which was denied—do not relate to matters of substance and provide no reason for a grant of certiorari.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

71-1614

NOV 1

MICHAEL RODAK,

SUPREME COURT OF THE UNITED STATES

No. A-1185

WENDEL EVERETT LOWRY and LOWRY INVESTMENTS, INC., a Colorado corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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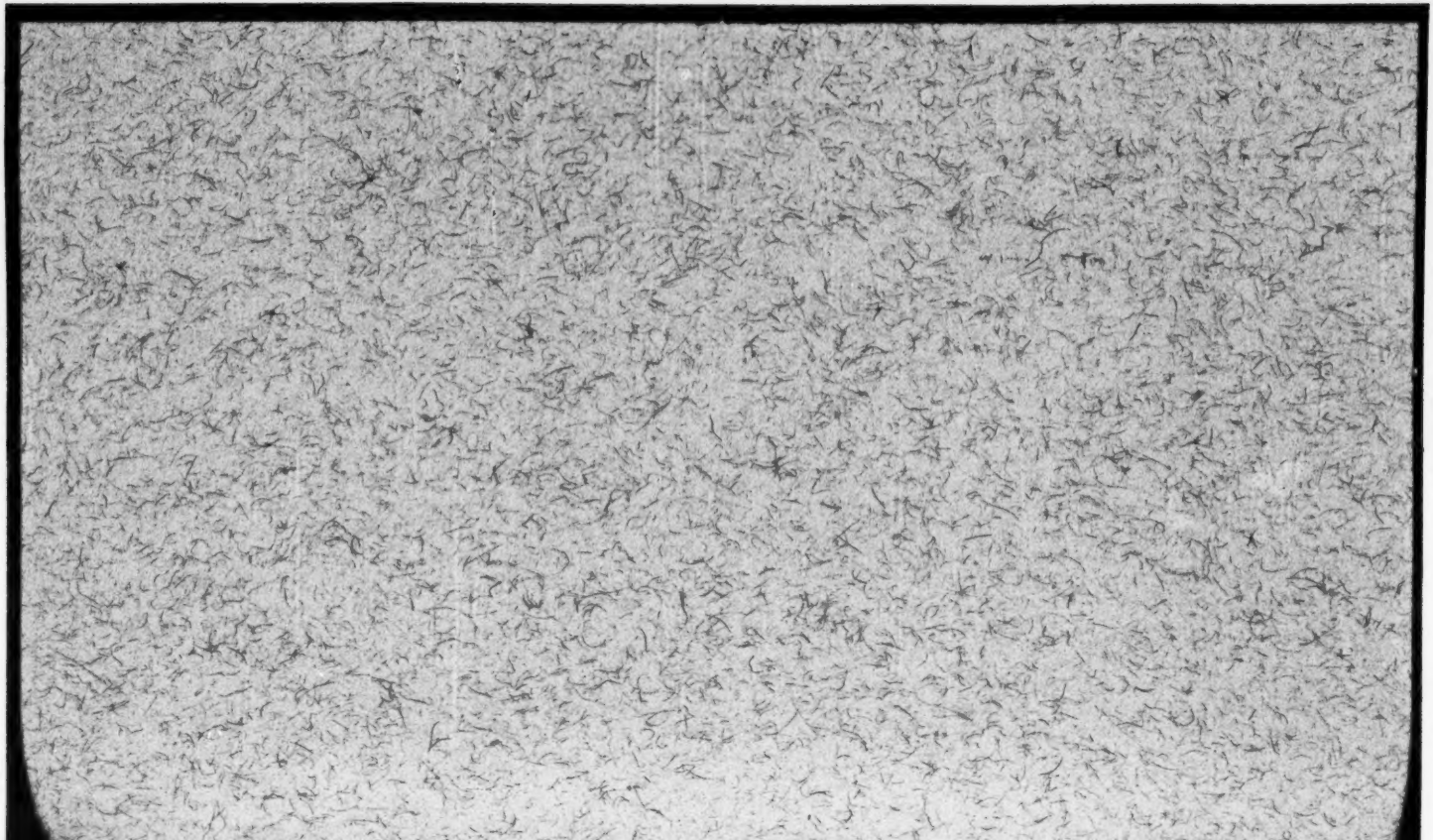

SUPREME COURT OF THE UNITED STATES

No. A-1185

WENDEL EVERETT LOWRY and LOWRY INVESTMENTS, INC., a Colorado corporation,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTION

Petitioners, WENDEL E. LOWRY and LOWRY INVESTMENTS, INC., respectfully move the Court for a Rehearing of the denial of their Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit for the reasons hereinafter set forth.

It is noted that Mr. Justice Douglas was of the opinion that the Petition should have been granted. We submit that on practical grounds, and in the interests of better procedure with the goal of lessening the burden on the lower courts in the federal judicial system, Mr. Justice Douglas' position should be adopted by the full Court and Certiorari granted.

II.

REASONS FOR GRANTING PETITION FOR REHEARING AND GRANTING WRIT

Petitioners' counsel is acutely aware of the deluge of cases flooding this Court. Indeed, it is axiomatic that the Court traditionally is compelled to decline to hear cases that have merit because of the excessive demands made upon the Court by a dynamic society constantly developing new problems, more complex legal situations and questions, new legal areas, as well as the rise in legal business brought about by an expanding population and the concomitant social-legal problems such growth must necessarily entail. Changes in the attitudes toward minority groups of all kinds, school desegregation questions, problems relating to bussing, pornography, redistricting, to mention a few, combine to place what many observers and commentators feel is an intolerable burden upon the Court. The criminal law continues to take up much of the Court's time.

The lower courts are also clogged with legal business, much of it also in the criminal field. The backlog in many Districts is beyond belief. It is commonplace for trial Judges to point out that they are so deluged with criminal prosecutions, habeas corpus applications, and Section 2255 proceedings, as well as cases being brought up from the State Courts, that they find it almost impossible to take care of civil litigation. As the Court well knows, this situation has led to suggestions which would lead to eliminating diversity of citizenship cases from the jurisdiction of the federal courts. Therefore, it is submitted that the Court should always be alert to take cases that by their nature will enable the Court, either by plain decision, or by the exercise of its rule making and super-

visory powers, to render much needed assistance to lower federal courts. Such help is vital before the federal system collapses under the sheer weight of the numbers of criminal matters it now must entertain.

The subject matter of this case ultimately relates to the day to day business and practice of the federal district courts. Not only are the constitutional rights of the individuals of concern here, but whether the courts can continue to efficiently dispense justice, and whether they in fact are able to do so.

It has long been the practice of District Attorneys to add a conspiracy count as the last count in an indictment which charges one or more substantive offenses. This routine charge ultimately results in a more liberal reception of evidence, and as a matter of being practical, in hearsay evidence going in which could never be admitted absent the conspiracy charge. The receiving of hearsay evidence, beyond that allowable without the conspiracy charge, or in a civil case for that matter, has been so rampant that a prosecutor would be remiss in his duties if he failed to include a conspiracy count in most indictments. The presently accepted doctrine that the prosecution must make its own case becomes a farce when the posture of the case is developed by the liberal use of conspiracy type hearsay evidence. Once the case is completed it often becomes immaterial if the prosecutor dismisses the conspiracy count at the conclusion of his case in chief, or when all of the evidence is in. The defense is without any means to effectively resist such evidence, and once in, no matter what happens to the conspiracy count, such evidence will have a marked effect on the outcome of the case. Warning instructions given by the court are almost always of no avail.

In the case at bar, although the very nature of the basic charges, a scheme to use the mails to defraud in the sale of securities, would allow the use of conspiracy type hearsay evidence, the Government nevertheless added a seventh count charging a conspiracy to use the mails to defraud. This meant the use of hearsay evidence to prove conspiracy to enter into a scheme which also allows liberal use of hearsay evidence. This type of pleading can only be described as "piggy-back" pleading, the use of hearsay evidence on hearsay evidence. Even the trial court objected to this and persuaded the Government to dismiss Count Seven before trial. This sort of thing should not be tolerated. It should be the obligation of this Court, rather than the district courts, to put an end to such practice by the exercise of its rule making powers as suggested in these Petitioners' Petition for Writ of Certiorari.

Discouraging the use of conspiracy counts in cases where there are substantive counts would do a great deal to assist the lower courts, would restore the rules of evidence relating to hearsay to a consistent pattern not entirely dependent upon the whims of various trial courts, and would encourage government prosecutors to try substantive counts on their merits, or if the case is weak, not at all.

Keeping this discussion on a practical level, in a case arising in the District of Kansas, now on appeal to the Court of Appeals for the Tenth Circuit (United States vs. Tager, No.), the defendant was charged in a separate indictment with conspiring to impede and obstruct the Government in the collection of taxes. No substantive charge was made. The defendant never knew exactly what he was charged with, except a conspiracy under 18 U.S.C. Sec. 371. That meant the receiving into evidence of hearsay evidence from an alleged co-con-

spirator who was not even indicted. The next step, in what became a legal charade, was as follows: A motion was made by the Government to consolidate the pure conspiracy charge with another indictment which charged two counts of income tax evasion—not related to the conspiracy charge, and both weak on evidence. Not only that, but to get around the statute of limitations, the conspiracy indictment simply added two conversations with Internal Revenue Service agents within the period of limitations. The evidence on the conspiracy charge was, of course, far reaching and decidedly hearsay. The conspiracy evidence was so all-encompassing that it had to have an effect on the first indictment, and did. Conviction followed on both, although the evidence on the conspiracy charge took 80% of the trial time, much of it hearsay and indefensible. Not only that, but the attorney for the Justice Department made it known that if this particular conspiracy charge "stuck" there would be more cases like it filed by the Justice Department.

It is submitted that as a prosecution tool the conspiracy charge will have more and varied uses depending upon the ingenuity of the prosecution. To conclude, the conspiracy charge, and the related concept of the scheme, have played havoc with the ordinary rules of evidence, the rights of the accused, and trial time of the lower courts. This prosecution-oriented concept must be controlled, otherwise the situation can only become worse as is amply demonstrated by the Tager case.

Individual members of this Court have deplored the conspiracy charge; the lower courts and this writer's brethren at the bar are all familiar with the problem and have also deplored it. The help of the Court is urged in the interest of uniformity, control and justice.

III.

CONCLUSION

It is respectfully requested that the Court reverse its order denying these Petitioners' Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit and enter an order granting such Petition.

Respectfully submitted,

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CERTIFICATE

The undersigned, counsel for Petitioners herein, hereby certifies that this Petition for Rehearing is presented in good faith and not for purposes of delay. Counsel further certifies that the Petition is restricted to substantial grounds available to Petitioners, but not previously presented, to-wit: The practical aspect and impact of the denial upon the lower Courts, prosecuting attorneys, and the administration of criminal justice.

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